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THE
CONTENTIOUS PROBATE PRACTICE

OF
The High Court of Justice.

THE
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OF

The High Court of Justice

IN RESPECT OF

GRANTS OF PROBATES & ADMINISTRATIONS,

WITH THE

PRACTICE AS TO MOTIONS AND SUMMONSES

IN

NON-CONTENTIOUS BUSINESS.

BY

THOMAS HUTCHINSON TRISTRAM, D.C.L.,

ADVOCATE OF DOCTORS' COMMONS,

OF THE INNER TEMPLE,

Chancellor of the Diocese of London.

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SIR JAMES HANNEN, KNT.

*President of the Probate, Divorce and Admiralty Division of
The High Court of Justice,*

This Work

IS, BY HIS LORDSHIP'S KIND PERMISSION,

RESPECTFULLY DEDICATED

BY

THE AUTHOR.

P R E F A C E.



THE design of the present work is to furnish the legal profession with a concise statement of the Contentious Practice of the Probate, Divorce and Admiralty Division* of the High Court of Justice in respect of grants of Probates and Administrations. It is intended as a supplement to the great work of Mr. Justice Williams on the Law of Executors and Administrators, and to the treatise by Mr. H. C. Coote on the Common Form Practice of the Probate Division in granting Probates and Administrations, which has been long a recognized text book of the Court.

The work of Mr. Coote is specially limited to the Common Form, or Non-Contentious, Business of the Court, and many parts of the Contentious Business do not come within the scope of the work of Mr. Justice Williams. The want of a treatise on the Contentious Practice of the Court of Probate was shortly after its establishment, in 1858, felt by the legal profession ; and to supply this want I wrote a short treatise on the subject, which appeared in the second and in the subsequent editions of Mr. Coote's Common Form Practice published prior to the changes introduced by the Judicature Acts.

* For convenience, this Division of the High Court is in the text generally called the Probate Court.

The *Law Times* in its reviews of this treatise suggested, that for the convenience of the legal profession I should publish a more comprehensive work on this branch of practice ; and in consequence of this suggestion I announced my intention of publishing such a work, which, however, until the present time, I have been unable to accomplish. As Mr. Coote's Common Form Practice treats only, and that incidentally, of some of the points of practice of the Court on motions and summonses in Non-Contentious Business, I have given a general outline of such practice in the first four Chapters of the present work.

The Common Form Practice is not affected by the Judicature Acts. It is regulated by the Rules of the Court of Probate, which were issued in 1862, and subsequently, under the powers contained in the Court of Probate Act, 1857, and by the provisions contained in that and subsequent Statutes, and where the Rules and Statutes are silent, it is regulated by the practice of the Prerogative Court of Canterbury.*

The Contentious Business of the Court is now regulated by the Judicature Acts and by the Rules issued under them, and where these Acts and Rules are silent by the

* NOTE.—In 1858, on the establishment of the Court of Probate, rules were issued under the Probate Act, 1857, regulating the practice in making grants of probate and administration in common form. These rules embodied the general rules of practice, which, at the time of the passing of the Act, prevailed in the Prerogative Court of Canterbury, and which had been introduced by the judges of the Prerogative Court, from time to time, for the security of property passing under grants of probate or administration. The rules of 1858 were in some respects varied and superseded by those of 1862.

Court of Probate Acts and the Rules of that Court, and in cases not otherwise provided for by the practice of the Prerogative Court of Canterbury.

In the text of this work, all the sections of the Court of Probate Acts, 1857 and 1858, which are now in force in Contentious Business, as also the Rules of the late Court of Probate, in so far as they are not inconsistent with, and therefore not repealed by, the Judicature Acts, are printed in extenso.

In the Appendix all the Rules of the Court of Probate which were in force at the time when the Judicature Acts came into operation are also printed in extenso, for reference and in illustration of the former practice.

I have deemed it unnecessary to cite the decisions in the other Divisions of the High Court of Justice on the Judicature Acts, and on the new Rules, unless they have a direct bearing on the Probate Practice, as by so doing I should have departed from the design of the present work, which is to supply the legal profession with a Practice of the Contentious Business of the Probate Court, of a convenient size for ordinary use. Moreover, these decisions are referred to in Mr. Arthur Wilson's * work on the Judicature Acts (with whom and Mr. H. Cadman Jones I was associated by appointment of the Lord Chancellor to draft Rules for the Judicature Act, 1875, to be submitted for consideration to Her Majesty's Judges), and who refrained from commenting on the probate practice in his work on

* Since promoted to be one of Her Majesty's Judges of the High Court of Judicature of Calcutta.

the understanding that I would myself publish a work on that subject.

I desire here to record my thanks to my friend Edward Francis Jenner, Esquire, one of the Registrars of the Court, for supplying me with information during the preparation of this work in regard to recent changes made in the practice of the Probate Registry.

T. H. TRISTRAM.

1, KING'S BENCH WALK, TEMPLE,
December 11th, 1880.

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CORRIGENDA AND ADDENDA.

Page 3.—As to decrees of administration to the solicitor of the Duchy of Lancaster as the nominee of the sovereign *jure Ducatûs*.

In *Whitaker v. Stephenson*, an action now pending in the Probate Court, the solicitor for H. M.'s Treasury is contesting the title of the Duchy of Lancaster to administration of the goods of bastards and persons, without known relations, dying domiciled elsewhere in the Duchy than in the county palatine of Lancaster.

Page 67.—It is here in terms stated that the jurisdiction to grant probate or administration, and to determine the questions leading up to the grant, belong exclusively to the Probate Division. Sir *G. Jessel* (M. R.), in *Pinney v. Hunt* (6 Ch. Div. 98), held, that where a probate action had been improperly brought in the wrong division of the High Court, it was in the discretion of the judge of such division to determine, whether he would or would not exercise the jurisdiction, but that, in the exercise of a sound discretion, he would decline to exercise the jurisdiction.

Page 124.—Order XIX. r. 24. See *Philipps v. Philipps*, 4 Q. B. Div. 127.

Page 140—181.—*Forms of Statement of Defence and Reply in an Administration Action or Interest Suit.*

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate.)

Between A. B. Plaintiff.

and

C. D. Defendant.

Defence.

1. The defendant admits that M. N. died a widower, without child, parent, brother or sister, uncle or aunt, or niece, but he denies that he died without nephew.

2. The deceased had a brother named G. B., who died in his lifetime.

3. G. B. was married to E. H. in the parish church of in the county of on the day of and had issue of such marriage, the defendant, who was born in the month of , and is the nephew and next of kin of the deceased.

The defendant therefore claims:—

That the court pronounce that he is the nephew and next of kin of the deceased, and as such entitled to a grant of letters of administration of the personal estate and effects of the deceased.

In the High Court of Justice.

Probate, Divorce, and Admiralty Division.

(Probate.)

Between A. B. Plaintiff.

and

C. D. Defendant.

Reply.

1. The plaintiff denies that G. B. was married to E. H.

2. He also denies that the defendant is the issue of such marriage.

Page 160.—*For* persons who are unsound through their own acts, namely, drunkenness, *read*, persons who are unsound through their own act.

Page 169.—Revocation of a will does not involve the revocation of a codicil not referred to in the revocatory paper. *Farrer v. St. Catherine's College, Cambridge*, L. R., 16 Eq. Cas. 19.

Page 197.—DISCONTINUANCE.

The discontinuance of a probate action in the Probate Division, at the instance of either the plaintiff or defendant, is generally effected by an order of a registrar made on summons.

The withdrawal of a cause entered for trial in the Probate Division by one of the parties with the consent of the other, is also usually effected by an order made by a registrar on summons.

In either case, however, the parties may proceed under Order XXIII.

ORDER XXIII.—*Discontinuance.*

“The plaintiff may, at any time before receipt of the defendant’s statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant’s costs of the action, or, if the action be not wholly discontinued, the defendant’s costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record, or discontinue the action, without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.” R. 1.

“*Withdrawal of Record by Consent.*”—When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties.” R. 2.

EXPLANATION OF ABBREVIATIONS AND REFERENCES.

- S. & T. . . Swabe & Tristram’s Reports.
 L. J. . . Law Journal—Probate and Matrimonial Reports.
 L. R. . . Law Reports—Probate and Divorce.
 Prob. Div. Law Reports—Probate Division.
 The Court of Probate Act, 1857 . . 20 & 21 Vict. c. 77.
 Court of Probate Act, 1858 . . 21 & 22 Vict. c. 95.
 R. N.-C. . . Rules of the Court of Probate in Non-Contentious Business, 1862, &c.
 R. or R. C. B. . Rules of the Court of Probate in Contentious Business, 1862, &c.

THE PRACTICE
OF
The Probate Division
IN
CONTENTIOUS BUSINESS, &c.

CHAPTER I.

JURISDICTION—MOTIONS IN NON-CONTENTIOUS BUSINESS—
MOTIONS FOR DECREES OF COURT—MOTIONS FOR ORDERS OF
COURT—ATTACHMENTS—REGULATIONS AS TO MOTIONS—
NOTICES—INSTRUMENTS AND AFFIDAVITS TO BE FILED—
PRESUMPTIVE PROOF OF DEATH—REQUIREMENTS FOR AFFI-
DAVITS—APPLICATIONS THROUGH DISTRICT REGISTRIES—
SUBSTITUTED SERVICE—JUSTIFYING SECURITY, ETC.

THE business of the Court of Probate related solely to the granting of probates and of letters of administration, and was of two kinds :—non-contentious or common form business, and contentious business, in both of which that Court had exclusive jurisdiction (*a*).

This jurisdiction was transferred by the Judicature Acts (1873 and 1875) 36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77, to the High Court of Justice, and under the pro-

(*a*) The exclusive jurisdiction to prove wills of personal estate and to grant Letters of Administration of the personal estate of intestates belonged to the Ecclesiastical Courts (except in certain districts in which it was vested in manorial or other lay courts), from some time anterior to the reign of Edward I. up to the 11th of January, 1858. It was then, by 20 & 21 Vict. c. 77, transferred to the Probate Court. This statute conferred on that court a further jurisdiction, (which did not belong to the Ecclesiastical Courts), in respect of devises of real estate (*i.e.* of freehold, copyhold and customary estate) contained in a will,—disposing of personal as well as of real estate,—by making its decrees in a suit relating to such will enure for the benefit of all persons interested in realty affected by the will as against those who had become or been made parties to the suit as directed by the act.

visions of sects. 33 & 34 of the Judicature Act, 1873, it is to be administered, until further order, exclusively in the Probate, Divorce, and Admiralty Division of the High Court. The words relative to the probate business are as follows: "All causes and matters which would have been within the exclusive cognizance of the Court of Probate, shall be assigned, subject to any rules of Court or orders of transfer to be made under the authority of this Act, to the Probate, Divorce, and Admiralty Division of the High Court."

Non-contentious business defined.

Non-contentious or common form business, which consists in proving wills in common form, and in obtaining grants of letters of administration without the sanction of a judgment of the Court, is transacted either in the London or principal registry of the Probate Division (*b*), or in the probate district registries.

There are, however, certain cases in which the principal registrars are not allowed by the rules or practice to issue a grant in common form, or in which they, acting on their own judgment, may decline to issue it without the sanction of the Court, and in such cases the application is brought before the judge in Court on motion for his directions and decree thereon. In certain cases the district registrars are not allowed to issue a grant without an order of the judge or of one of the principal registrars.

Sources of practice in non-contentious business.

The practice of the Probate Division in non-contentious business is regulated by what was the practice of the Prerogative Court of Canterbury as altered by the Court of Probate Act, 1857, and by the rules and orders made under that Act, by the Court of Probate Act, 1858, and by the Confirmation and Probate Act, 1858 (21 & 22 Viet. c. 56). The rules of procedure and practice established by the Judicature Acts extend only to proceedings in an action. *In the goods of Cartwright*, 1 P. Div. 422.

(*b*) For convenience the Division of the High Court of Justice in which probate business is transacted will be called in the ensuing pages the Probate Division.

Probate business becomes contentious upon a writ of summons being served on a party interested, or supposed or claiming to be interested therein, and continues to be contentious until the termination of the action commenced by the writ of summons. Contentious business defined.

The province of this work is to treat of the Contentious Business of the Probate Division, and of so much of the non-contentious business as relates to motions in Court, to caveats, to citations, and to applications in chambers on summons.

OF MOTIONS.

According to the rules and practice of the Probate Division applications in certain matters should or may be made to the Court on motion in non-contentious as well as in contentious business.

OF MOTIONS IN NON-CONTENTIOUS BUSINESS.

By the practice of the Probate Division a decree of the Court, which can only be obtained on motion, is required in the following cases:— Cases where a decree on motion requisite.

1. For a grant of administration to the solicitor to Her Majesty's Treasury as nominee of the sovereign jure Coronæ, or to the solicitor to the Duchy of Lancaster as nominee of the sovereign jure Ducatûs, or to the solicitor to the Duchy of Cornwall as nominee of H.R.H. the Prince of Wales jure Ducatûs, on the ground that the deceased died a bastard or without known relations, and that the sovereign, or the Duchy of Lancaster or the Duchy of Cornwall where the deceased has died domiciled within their respective duchies, are entitled to his personal estate, and, therefore, to have a grant of letters of administration of the same issued to their nominee. Decree of administration to solicitors to treasury, Duchy of Lancaster or Duchy of Cornwall.

2. For a general grant of probate or administration to a person having an inferior title, in the absence of the re- Decree of administration to persons

having an inferior title thereto.

nunciation of persons having a prior or superior title to the grant.

This is the case where the residuary legatee, or other person interested in the residuary estate, applies for letters of administration with the will annexed, passing over an executor, or where a legatee applies for a like grant, passing over the executor, residuary legatee, or other parties interested in the residue, or where a creditor applies for a grant of administration with or without a will annexed, passing over all parties interested in the estate under a will or by the Statute of Distributions.

In such cases, when all persons having a superior title to a grant have been duly cited to accept it and have not done so, the grant may be decreed on motion to a person having an inferior title to it.

For the rule is, that a person having an inferior right to a grant of probate or administration can only obtain such grant, after all persons who have a superior right to it have abandoned or waived such right, either by renunciation or by failing to appear and take the grant after having been cited to appear and accept or refuse it.

The effect of renunciation or non-appearance to a citation to take the grant under Court of Probate Acts.

Court of Probate Act, 1857, s. 79.

The effect of an executor renouncing, or on his being cited to take probate of his not appearing and taking it, now is, that his right to the executorship wholly ceases, and the executorship devolves, as if he had not been appointed.

See the Court of Probate Act (1857), s. 79. "Where any person, after the commencement of this act, renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor."

Court of Probate Act, 1858, s. 16.

See also Court of Probate Act (1858), s. 16. "Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate,

“ and does not appear to such citation, the right of such
 “ person in respect of the executorship shall wholly cease,
 “ and the representation to the testator and the administra-
 “ tion of his effects shall and may, without any further re-
 “ nunciation, go, devolve and be committed in like manner
 “ as if such person had not been appointed executor.”

3. For a grant of probate or administration where the proof of death is presumptive. This arises where the applicant for a grant is unable to comply with the ordinary rule, which requires him to depose in his affidavit to lead the grant, to the precise day, month and year on which the deceased died, owing to there being no direct evidence of his being dead, but only evidence from which his death may be presumed to have taken place from his disappearance at or after a given period, and from the circumstances attending such disappearance, or from his not having been heard of for a period of seven years or longer by those with whom he might reasonably have been expected to communicate, or from his having been on board a ship, which, from its non-arrival in port within a reasonable time, from the absence of tidings of any of those on board, and from other circumstances, is supposed to have foundered at sea.

Decree of probate or administration where proof of the death of the deceased is presumptive.

4. For a grant of probate or administration (with will annexed) of a lost will, as contained in a draft or in a copy, or of its contents or substance as embodied in an affidavit, where the original will has been lost through no default on the part of any one interested in the deceased's estate, and it is desired, with the consent of the parties interested, in any event, in the estate, to obtain probate of the contents of the will as contained in the draft or a copy, or of its substance as set forth in an affidavit.

Decree of probate of a lost will.

In other cases of lost wills, the general practice of the Court is to require the will, as contained in the draft or copy, or its substance, to be propounded.

5. For a grant where there is a doubt or a contest as to the person to whom the grant ought to issue, or as to whether a paper is entitled to probate, or as to whether any portion of a testamentary paper ought to be excluded

Decree of probate or administration where doubt exists as to party entitled

to grant or as to what should be included in probate.

Decree of probate in cases referred to court by principal or district registrar.

Decree of administration under 73rd section of the Court of Probate Act, 1857. The Court of Probate Act, 1857, s. 73.

from the probate, and the different or contending parties consent to the question in doubt or in dispute being determined, at any rate in the first instance, on motion.

6. For a grant, where the principal registrar, to whom an application for a grant has been made in the registry, or to whom a district registrar has referred for directions, as to whether a grant should issue, considers that there are difficulties in the matter which ought to be referred to the judge in Court for his directions thereon.

7. For a grant of administration under the 73rd section of the Court of Probate Act (1857), which provides, that “Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased or of any part of such personal estate, other than the person who if this Act had not been passed would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who if this Act had not passed would by law have been entitled to a grant thereof, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit.”

Grants have been made under this section in the following classes of cases:—

Grants to parties taking no interest.

(a) To mere nominees and other parties taking no interest in the estate under very special circumstances:

To a nominee, who took no interest in the deceased's estate, of parties solely interested therein, and who were very old. *In the goods of Hannah Roberts*, 1 S. & T. 64.

Cases of refusal.—See *In the goods of Richardson*, 2 L. R. 244; 40 L. J. 36; *Teague & Ashdown v. Wharton*, 2 L. R. 360; 41 L. J. 13; *In the goods of Hale*, 3 L. R. 207.

To the nominee of a married woman, being a legatee to her separate use, after the refusal of her husband to join in the administration bond. *In the goods of Warren*, 1 L. R. 538; 37 L. J. 12.

To the clerk of the guardians of the poor for the use and benefit of a pauper lunatic during his lunacy, after the usual citations. *The Guardians of Mile End v. Findley*, 3 S. & T. 265; 33 L. J. 21.

(b) Without notice to parties having a claim to the grant, and who by the practice should be cited :

Grants without citing parties having a claim to the grant.

To the guardian elected by three minors, where the eldest child (who was of age) was abroad, and had no notice. *In the goods of Burgess*, 4 S. & T. 188; 32 L. J. 158.

To the guardian elected by minors for their use and benefit, without requiring the renunciation or citation of their next of kin, who were in Australia, where the property was small. *In the goods of Hagger*, 3 S. & T. 65; 32 L. J. 96.

To the nominee of a married woman living separate from her husband as residuary legatee, she being entitled under her marriage settlement to such residue for her separate use, without notice to her husband. *In the goods of Pine*, 1 L. R. 388; 36 L. J. 95; *In the goods of Maychell*, 4 P. Div. 74; 47 L. J. 31.

To the guardian of persons entitled in distribution, where the next of kin, who had a prior claim to the grant, was in America, and could not be found. *In the goods of John See*, 4 P. Div. 86; 48 L. J. 70.

(c) Immediate grants, quasi per saltum :

Immediate grants, quasi per saltum.

Where a person had not been heard of for seven years, and his sole next-of-kin died within the seven years, ad-

ministration of his estate was granted direct to the person who was his next-of-kin at the end of the seven years. *In the goods of Peck*, 2 S. & T. 506.

Where the father of the deceased had deserted his wife for twelve years, and had not been heard of for seven years, administration was granted direct to the wife as mother of the deceased. *In the goods of Smith*, 2 S. & T. 508; 31 L. J. 182.

(d) Where the issue of the grant was urgent :

Grants in cases of urgency.

To the person authorized by a power of attorney to manage the property of a party who was abroad, and was interested in the deceased's estate, and it was not known when she would return. *In the goods of Escot*, 4 S. & T. 186; 28 L. J. 17.

To the father-in-law of the party entitled, who was in Australia, for his use and benefit. *In the goods of Jones*, 1 S. & T. 13; 27 L. J. 17.

Decree of a grant de novo.

8. For a grant de novo, owing to the incapacity of one of the personal representatives.

Where one of several executors or administrators, who have taken a joint grant, has become lunatic, the Court will call in and revoke this grant, and issue a grant de novo to the sane executors or administrators. *In the goods of Phillips*, 2 Add. 335; *In the goods of Newton*, 3 Curt. 428; *In the goods of Marshall*, 1 Curt. 297.

9. For a limited grant to a person entitled to a general grant.

Decree of limited administration to person entitled to the general grant.

No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant, except under the direction of the judge. R. 30, N.-C.

Decree of administration limited to a trust estate.

10. For a grant of administration limited to a trust estate, which would pass under a general grant.

It sometimes happens, that, when a personal representation to the deceased is required in respect of an estate of which he was trustee, there is a difficulty in inducing persons who, as executors, trustees, or as possible beneficiaries,

are entitled to a general grant to take such grant, and although the party interested in the trust fund would himself, upon the persons having a prior title renouncing, or failing after being cited to take the grant, be entitled to a general grant, yet, as his taking a grant in such form would involve him in the responsibility of administering the deceased's general estate, which he may be anxious to avoid, the Court may in such case decree a grant of administration to issue to the cestui que trust or to his nominee, limited to the particular trust property on the parties having a prior right to a general grant renouncing, or having failed on being cited to accept the grant.

11. For a limited grant, owing to the incapacity of a duly-constituted personal representative.

Decree of administration limited during lunacy of executor or administrator.

Where an executor or administrator has become lunatic after taking the grant, on the principle of necessity, a temporary administration will be granted without revoking the former grant during the incapacity of the personal representative. *In the goods of Binfield*, 1 Lee, 625; *Evans v. Tyler*, 2 Roberts. 134.

12. For grants limited to a particular subject.

Decree of administration limited to a particular subject.

"Limited administrations are not to be granted unless "every person entitled to the general grant has consented "or renounced, or has been cited and failed to appear, "except under the direction of the judge."—R. 29, N.-C. By the practice of the Prerogative Court a grant limited to the only portion of an estate left unadministered issued without a renunciation or citation. In such a case by the present practice the application is reported by the registrar to the judge, and the grant issues under the direction of the judge without a motion. In all other cases, except where the parties entitled to the general grant have renounced or consented, the Court must be moved for a limited grant.

(a) Administration de bonis non with will annexed was decreed to a legatee, limited to receive a legacy in the funds and the dividends due thereon; the chain of executor-

ship having been broken, and the person entitled to the general grant de bonis non being in Italy and not expected to return for some years. *In the goods of Steadman*, 2 Hagg. 59.

(b) Administration to the agent of a foreigner limited to substantiate proceedings in Chancery for the recovery of a debt, and to the receipt of the debt. *In the goods of the Elector of Hesse*, 1 Hagg. 93; *Harris v. Milburn*, 2 Hagg. 63; *In the goods of Dodyson*, 1 S. & T. 259.

(c) Administration to a creditor limited to filing a bill in equity, the party entitled to the grant being in India, and not having been duly cited. *Woolley v. Green*, 3 Phill. 314.

Decree of a temporary administration under 38 Geo. 3, c. 87.

13. For a temporary grant of administration for a special purpose (*e. g.* to bring an action, or to obtain payment of a specific sum, &c.) during the absence out of the jurisdiction of her Majesty's High Court of Justice of an executor or administrator to whom a grant has already issued.

The jurisdiction to make such a grant in any case was conferred on the Ecclesiastical Courts by 38 Geo. 3, c. 87, but limited to the case of the absence of an executor, and to the purposes of becoming party to a bill in equity, and of carrying the decree in the suit in equity into effect.

The words of sect. 1 of this Act are "That at the expiration of twelve calendar months" (which means at or after the expiration of that period; *In the goods of Ruddy*, 2 L. R. 330; 41 L. J. 63) "from the death of any testator, "if the executors or executor, to whom probate of the will "shall have been granted, are or is then residing out of "the jurisdiction of his Majesty's courts of law and equity " (see *Hannay v. Taynton*, 2 Add. 505; *In the goods of Jouet*, Ib. 504), it shall be lawful for the Ecclesiastical "Court, which hath granted probate of such will, upon the "application of any creditor, next of kin, or legatee, "grounded on the affidavit hereinafter mentioned, to grant "such special administration as hereinafter is also mentioned; which administration shall be written or printed

38 Geo. 3,
c. 87, s. 1.

“ upon paper or parchment, stamped only with one five shilling stamp, and shall pay no further or other duty to his Majesty, his heirs, or successors.”

By the Court of Probate Act (1857), s. 74, this jurisdiction was extended to the case of the absence of a person who had taken administration with or without a will annexed.

See sect. 74 : “ The provisions of an Act passed in the thirty-eighth year of his late Majesty King George the third, chapter eighty-seven, shall apply (in like manner) to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of her Majesty’s Courts of law and equity;” and by the Court of Probate Act (1858), s. 18, this jurisdiction was extended to the case of all executors and administrators, so as to be applicable to the case of the absence of an executor of an executor (*In the goods of Grant*, 1 P. Div. 435; 45 L. J. 88; see also *In the goods of Collier*, 2 S. & T. 444; 31 L. J. 63), and also to cases where it was not intended to institute proceedings in Chancery.

The Court of Probate Act, 1857, sect. 74.

“ The provisions of an Act passed in the thirty-eighth year of George the third, chapter eighty-seven, and of ‘ The Court of Probate Act,’ shall be extended to all executors and administrators residing out of the jurisdiction of her Majesty’s Courts of law and equity, whether it be or be not intended to institute proceedings in the Court of Chancery, and to all grants made before and subsequently to the passing of the last-mentioned Act, and it shall be lawful to alter the language of the grant prescribed by the first-named statute so as to make it apply to grants made in the Court of Probate under the said last-mentioned Act.”

Court of Probate Act, 1858, sect. 18.

Upon the death or return of the executor or administrator, the authority of the special administrator continues until the purpose for which he was appointed has been effected, unless the general personal representative of the deceased

will take the further steps necessary to effect the purpose, as by being made a party to the action (if any) in question (*Taynton v. Hannay*, 3 Bos. & Pull. 26), when the special administrator after accounting will be entitled to his costs and to an order for his discharge, and the grant will be revoked. *Rainsford v. Taynton*, 7 Ves. 466. See The Court of Probate Act, 1857, sect. 75:—"After any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as the executor of the deceased as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked."

Decree of administration limited ad bona colligenda.

14. For a grant of administration ad bona colligenda defuncti, owing to the impossibility, under the special circumstances of the case, of the Court constituting a general personal representative in sufficient time to meet the necessities of the estate. Such grants have recently been made in the following cases:—

(a) To a creditor limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises which would expire before a general grant could be made. *In the goods of Clarkington*, 2 S. & T. 380; *In the goods of Stewart*, 1 L. R. 727.

(b) To the owner of a ship to realize and collect the property of a foreigner, who had died on board his ship, during his passage from America to London—possessed of bills of exchange drawn on merchants in Liverpool—there being a difficulty in communicating with the deceased's relations in the Southern States of North America, owing to the blockade of the Southern ports. *In the goods of Wykoff*, 3 S. & T. 20.

(c) To a creditor of a deceased schoolmaster, whose relations (if any) were foreigners and unknown, to collect the personal estate, give discharges for debts, and dispose of the goodwill of the school. *In the goods of Swordsfejer*, 1 P. Div. 424.

15. For the revocation of probate or of letters of administration obtained on an erroneous suggestion, or perineuriam, unless the parties interested consent to a registrar's order of revocation. Decree of revocation of probate or administration.

16. For a grant of probate or administration in cases where the registrar has declined to issue it, or where the applicant prefers to take the opinion of the judge in the first instance. Decree of probate or administration in cases of difficulty.

By the practice of the Probate Division an application on motion is required to obtain an order of Court in the following cases :— Orders of court on motion.

1. For an order for the reduction of the penalty of the usual administration bond, or to enable sureties to the bond to be dispensed with, or to limit the liability of a surety to a part of the sum under which the estate is sworn, or to allow a substitute to execute the bond instead of the administrator, under the Court of Probate Act (1857)— Orders for reducing penalty in an administration bond, for dispensing with sureties to bond, or limiting their liability.

Sect. 81. "Every person to whom any grant of administration shall be committed shall give bond to the judge of the Court of Probate to enure for the benefit of the judge for the time being, and, if the Court of Probate, or (in the case of a grant from the district registry) the district registrar, shall require, with one or more surety or sureties, conditioned for duly collecting, getting in and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct; provided that it shall not be necessary for the solicitor for the affairs of the treasury or the solicitor of the Duchy of Lancaster, applying for or obtaining administration to the use or benefit of her Majesty to give any such bond as aforesaid." The Court of Probate Act, 1857, sect. 81. Person to whom grant of administration shall be committed shall give bond.

Sect. 82. "Such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the Court or district

“ registrar, as the case may be, shall in any case think fit
 “ to direct the same to be reduced, in which case it shall
 “ be lawful for the Court or district registrar so to do, and
 “ the Court or district registrar may also direct that more
 “ bonds than one shall be given, so as to limit the liability
 “ of any surety to such amount as the Court or district
 “ registrar shall think reasonable.”

Penalty on
 bond.

Sect. 83. “ The Court may, on application made on
 “ motion or petition in a summary way, and on being
 “ satisfied that the condition of any such bond has been
 “ broken, order one of the registrars of the Court to assign
 “ the same to some person, to be named in such order, and
 “ such person, his executors or administrators, shall there-
 “ upon be entitled to sue on the said bond, in his own
 “ name, both at law and in equity, as if the same had
 “ been originally given to him instead of to the judge
 “ of the Court, and shall be entitled to recover thereon
 “ as trustee for all persons interested the full amount re-
 “ coverable in respect of any breach of the condition of the
 “ said bond.”

(1.) Cases of reduction of the administration bond :

An intestate left 3,000*l.* and 45*l.* of debt, and the sole party entitled was his mother, a foreigner, who was unable to secure the usual sureties. Bond in a penal sum of 100*l.* accepted. *In the goods of Gent*, 1 S. & T. 54; 27 L. J. 37.

Where administration was granted to enable a personal representative to execute a release to a trustee under a marriage settlement, the property was allowed to be sworn under a nominal sum of 20*l.* *In the goods of Staepoole*, 2 S. & T. 316; 30 L. J. 191.

(2.) Sureties dispensed with :

Where the deceased's estate had been transferred to the Accountant-General of the Court of Chancery, and would be administered by that Court. *Cleverley v. Gladdish*, 2 S. & T. 335; 31 L. J. 53; *In the goods of Maria De la Farque*, 2 S. & T. 631; 31 L. J. 199.

(3.) Liability of surety limited :

A separate bond has been accepted for further assets, where administration was taken out under 20,000*l.* and the usual bond given, and a further sum from a bankrupt estate became payable to the deceased's estate, which made it necessary to swear the property under 25,000*l.*, a separate bond in a penalty of 10,000*l.* was ordered to be accepted. *In the goods of Weir*, 1 S. & T. 506.

(4.) A substitute allowed to execute the bond for the administrator :

Where the administrator was in Japan, and a considerable sum of money had become payable to the estate under an order of the Court of Chancery, the Court allowed another person to file an affidavit as to the increase of the property, and to execute the bond in the place of the administrator, on the understanding that he should as soon as possible execute a similar bond. *In the goods of Ross*, 2 P. Div. 274.

Where a married woman was entitled to administration, and her husband refused to join in the bond, the Court allowed a third person to execute it for her. *In the goods of Sutherland*, 4 S. & T. 189 ; 31 L. J. 126.

2. For an order for the production in the principal or in a district registry of any testamentary paper against any person, not a party to an action, who can be shown to have such paper in his possession or under his control.

Order against a person not a party to an action to bring into registry a testamentary paper.

There are two modes of compelling a person to produce and bring into the registry any testamentary instrument shown by affidavit to be in his possession or under his control :

(1) By a subpoena, issued by one of the principal registrars, under the provisions of the Court of Probate Act (1858), s. 23, and Rule 73, which is the simplest and usual mode adopted.

Subpoena issued by a principal registrar.

Sect. 23. "It shall be lawful for a registrar of the "principal registry of the Court of Probate, and whether "any suit or other proceeding shall or shall not be pending

Court of Probate Act, 1858, sect. 23.

Registrar may issue subpoenas to produce papers, &c. “ in the said Court, to issue a subpoena requiring any person to produce and bring into the principal or any district registry, or otherwise, as in the said subpoena may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person, upon being duly served with the said subpoena, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said Court, and had been ordered by the judge of the Court of Probate to produce and bring in such paper or writing.”

The following are the rules in force relating to subpoenas to bring in testamentary papers:—

Subpoena to bring in testamentary papers. “ Any person bringing in a will or testamentary paper, in obedience to a subpoena, is to take it in the first instance to the clerk of the papers, who will prepare a minute to be signed by the registrar to whom the will or paper brought in is to be delivered, and the registrar will sign the minute recording the delivery thereof.”—R. 84.

The minute to be entered and fees payable on bringing in a testamentary paper. “ The minute is to be entered in the book of registrar’s minutes in the usual manner; and the fee for the entry, and a further fee for filing each testamentary paper, will then be payable. If these fees should not be paid by the person bringing in the will or paper, the same are to be charged to the person who may first apply to the clerk of the papers to make use of the will or papers so brought in. In case the person bringing in a will or testamentary paper may desire to have a voucher for its delivery into the registry, he may take an office copy of the minute on paying the usual fee for the same.”—R. 85.

Appearance to a subpoena to bring in a testamentary paper. “ Any person served with a subpoena to bring in a testamentary paper is at liberty to enter an appearance on payment of the usual fees, if he thinks fit to do so.”—R. 86.

“ The time fixed by a warning or a citation for entering an appearance, or by a subpoena to bring in a testamentary paper, shall, in all cases, be exclusive of Sundays, Christmas Day, and Good Friday.”—R. 87.

Time allowed for appearing to a subpoena to bring in a testamentary paper.

(2) By motion in Court supported by affidavit.

By the Court of Probate Act (1857), sect. 26: “ The Court of Probate may, on motion or petition, or otherwise, in a summary way, whether any suit or other proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court, or upon interrogatories respecting the same, and such persons shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court, and had made such default; and the costs of any such motion, petition or other proceeding shall be in the discretion of the Court.”

The Court of Probate Act, 1857, sect. 26. Order to produce any instrument purporting to be testamentary.

R. 73. “ Applications for an order for the production of papers or writings purporting to be testamentary may be made to the Judge, by motion or by summons, when a suit is pending, and by a motion upon affidavit when no suit is pending. If it can be shown that a testa-

“mentary paper is in the possession, within the power, or
 “under the control of any person, a subpoena for the pro-
 “duction of the same may be obtained by a registrar’s
 “order, founded on an affidavit.”

Order for ex-
 amination as
 to knowledge
 of contents of
 testamentary
 paper.

3. For an order for the examination in Court, or upon
 interrogatories of a person who appears to have knowledge
 of the contents of a testamentary paper, when it cannot be
 shown that he has it in his possession or under his control,
 see ante, p. 16, the Court of Probate Act (1857), s. 26,
 and R. 73.

Orders for
 attachment in
 non-contenti-
 ous business.
 In contentious
 business.
 Under
 Debtors’ Act,
 1869, sect. 5.

4. For an order for attachment for contempt of Court
 in a matter arising in non-contentious business.

An application for attachment in contentious business
 may be made against a party to an action by another party
 to the action, either by a motion or on summons. But if
 the application is made in consequence of non-compliance
 with an order or judgment for the payment of a sum of
 money, it comes within section 5 of the Debtors’ Act,
 1869 (32 & 33 Vict. c. 62), and must, whether in con-
 tentious or non-contentious business, be made on summons.

The Court of Probate had power to attach persons for non-
 compliance with certain orders of Court made in non-contenti-
 ous as well as in contentious business, in like manner as the
 Court of Chancery had, by the Court of Probate Act (1857),
 ss. 24 and 25.

The Court of
 Probate Act,
 1857, sect. 24.
 Powers to
 examine
 witnesses.

Sect. 24. “The Court of Probate may require the
 “attendance of any party in person, or of any person
 “whom it may think fit to examine or cause to be examined
 “in any suit or other proceeding in respect of matters or
 “causes testamentary, and may examine or cause to be
 “examined upon oath or affirmation, as the case may
 “require, parties and witnesses by word of mouth, and
 “may, either before or after or with or without such
 “examination, cause them or any of them to be examined
 “on interrogatories, or receive their or any of their affi-
 “davits or solemn affirmations, as the case may be; and
 “the Court may by writ require such attendance, and

As to produc-
 tion of deeds,
 &c.

“order to be produced before itself or otherwise any deeds, evidences or writings, in the same form, or nearly as may be, as that in which a writ of subpoena ad testificandum, or of subpoena duces tecum, is now issued by any of her Majesty’s superior courts of law at Westminster, and every person disobeying any such writ shall be considered as in contempt of the Court, and also be liable to forfeit a sum not exceeding one hundred pounds.”

Sect. 25. “The Court of Probate shall have the like powers, jurisdiction, and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting or refusing to produce deeds, evidences or writings, or refusing to appear or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court.”

The Court of Probate Act, 1857, sect. 25. Powers of the Court to enforce orders.

A judge of the Probate Division is empowered to issue an attachment for non-compliance with a decree or order of the Court or judge by the following order:—

“Every order of the Court or a judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect.” Order XLII. R. 20.

Any order of a Court or a judge enforceable by attachment.

An attachment is a writ directed to the sheriff or other officer of the county or jurisdiction, wherein the party against whom the writ is issued is likely to be found, to have him before the Court to answer for his contempt. 1 Dan. Prac. 5th ed. pp. 387, 907.

“A writ of attachment shall have the same effect as a

“ writ of attachment issued out of the Court of Chancery
“ has hitherto had.” Order XLIV. R. 1.

Attachment
for recovery
of property
other than
land or
money.

A writ of attachment may be issued in the following cases:—

(1.) To enforce a judgment or order for the recovery of any property other than land or money.

“ A judgment for the recovery of any property other
“ than land or money may be enforced:

“ By writ for the delivery of the property;

“ By writ of attachment;

“ By writ of sequestration.” Order XLII. R. 3.

Attachment
to compel per-
formance or
non-performa-
ance of an
act.

(2.) To enforce a judgment or order requiring the performance of any act other than the payment of money, or the non-performance of any act.

“ A judgment requiring any person to do any act other
“ than the payment of money, or to abstain from doing
“ anything, may be enforced by writ of attachment, or by
“ committal.” Order XLII. R. 5.

Attachment
to compel
payment of
money held
by a person as
trustee or in a
fiduciary cha-
racter, or of
costs ordered
to be paid by a
solicitor for
misconduct.

(3.) To enforce an order for the payment to any person, or for the payment of money into Court where such money is money which a trustee or a person acting in the fiduciary character of a trustee has been ordered to pay, or costs which a solicitor has been ordered to pay for misconduct as such, or money which a solicitor has been ordered to pay in his character of an officer of the Court. General Orders of Chancery, Jan. 1870, rule 7.

Ord. 42, r. 1.
Judgment for
recovery of
money.

“ A judgment for the recovery by, or payment to, any
“ person of money, may be enforced by any of the modes
“ by which a judgment or decree for the payment of
“ money of any Court whose jurisdiction is transferred by
“ the said Act might have been enforced at the time of the
“ passing thereof.” Order XLII. R. 1.

Ord. 42, r. 2.
Judgment for
payment into
Court.

“ A judgment for the payment of money into Court
“ may be enforced by writ of sequestration, or in cases in
“ which attachment is authorized by law, by attachment.”
Order XLII. R. 2.

Debtors Act,
1869, sect. 5.

(4.) To enforce an order or judgment “for the payment

“ of any debt, or the instalment of any debt due in pursuance of any order or judgment of the Court by committing the party to prison for a term not exceeding six weeks, or until payment of the sum due, where it is proved to the satisfaction of the judge, that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay the same.

“ Proof of the means of the person making default may be given in such manner as the Court thinks just ; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules.

“ Any jurisdiction by this section given to the superior Courts may be exercised by a judge sitting in chambers, or otherwise, in the prescribed manner.

“ For the purposes of this section any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from time to time rescind or vary such order.

“ Persons committed under this section by a superior Court may be committed to the prison in which they would have been confined if arrested on a writ of capias ad satisfaciendum ; and every order of committal by any superior Court shall, subject to the prescribed rules, be issued, obeyed, and executed in the like manner as such writ.

“ No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place.”

A motion or summons for attachment should be supported—

(1.) By an affidavit of personal service of the judg-

ment or order in question on the party to be attached, or of a substitutional service, if leave has been obtained for substitutional service.

(2.) By an affidavit of non-compliance by the party to be attached with the judgment or order.

(3.) By an affidavit of service of notice of motion on the party, or upon his solicitors on the record. *Broening v. Sabin*, 5 Ch. Div. 511, M. R.

“No writ of attachment shall be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued.” Order XLIV. R. 2; *Baigent v. Baigent*, 1 P. Div. 421.

The application for an attachment should include an application for the costs of the attachment, as the applicant will have to pay the costs of a subsequent application for such costs. *Abud v. Riches*, 2 Ch. Div. 528.

Order discretionary, no appeal from Judge's decision.

It is a matter for the discretion of the judge to determine as to whether the order shall or shall not issue, and from his decision there is no appeal. *Ashwell v. Outram*, 5 Ch. Div. 943.

Debtors Act, 1878, sect. 1.

Thus it is provided by sect. 1 of the Debtors Act, 1878 (41 & 42 Vict. c. 54), “That in any case coming within the exceptions numbered 3 and 4 in the 4th section of the Debtors Act, 1869” (viz. in case of “default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of equity any sum in his possession or under his control,” or in “case of default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order),” “any Court or judge making the order for payment, or having jurisdiction in the action or proceeding in which the order for payment is made, may inquire into the case, and (subject to the provisos contained in the said sections respectively) may grant or refuse, either abso-

“lutely or upon terms, any application for a writ of attachment, or other process or order of arrest or imprisonment, and any application to stay the operation of any such writ, process or order, or for discharge from arrest or imprisonment thereunder.”

The following regulations are to be complied with preliminary to the issue of the writ :—

“No writ of execution shall be issued without the production to the officer by whom the same should be issued of the judgment upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.” Order XLII. R. 9.

Production of judgment or order of Court.
Ord. 42, r. 9.

“No writ of execution shall be issued without the party issuing it, or his solicitor, filing a præcipe for that purpose. The præcipe shall contain the title of the action, the reference to the record, the date of the judgment and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued, and shall be signed by [or on behalf of] the solicitor of the party issuing it, if he do so in person.” Order XLII. R. 10.

Præcipe to writ of attachment.
Ord. 42, r. 10.

The præcipe for a writ of attachment should be in the following form :—

Form of præcipe for writ of attachment.

Writ of Attachment.

“In the High Court of Justice, 18 . B. No. .

“Probate, Divorce and Admiralty Division.

“Probate.

“Between A. B. Plaintiff,
and

“C. D. and others Defendants.

“Seal in pursuance of order dated . . . day of

“an attachment directed to the sheriff of . . . against

“C. D. for not delivering to A. B. (*as the case may be.*)”

The writ must be prepared by the party at whose instance the order has been obtained, and must be either

written or printed on parchment, and should have a left-hand margin of sufficient width to admit of the stamp and the official seal (Chancery Order III. rule 1; Dan. Prac. 388), "and shall be taken to the registry with an office copy of the order, and when approved and signed by one of the registrars, shall be sealed with the seal of the Court." R. 108.

Form of writ
of attach-
ment.

The following is the form of a writ of attachment:—

Writ of Attachment.

"In the High Court of Justice, 18 . B. No. .

"Probate, Divorce and Admiralty Division.

"Probate.

"Between A. B. Plaintiff,
and

"C. D. and others Defendants.

"Victoria, &c.

"To the sheriff of greeting.

"We command you to attach C. D. so as to have him before us in the Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you. Witness, &c."

Indorsements
on writs of
attachment.

Ord. 42, r. 11.

"Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house

“ of such plaintiff’s or defendant’s residence if such there be.” Order XLII. R. 11.

The sheriff, after delivery of the writ to him, upon finding the party to be attached, must arrest him and lodge him in prison, or if he is already in prison, he must lodge a detainer against him, and the person at whose instance he has been attached may leave him in prison until he has cleared his contempt, and obtained his discharge. Dan. Pr. 390—93, and 999.

Execution of the writ of attachment by sheriff.

The sheriff should within a reasonable time after the delivery of the writ to him return the writ, and if he does not make a return, he may be compelled to do so on the party at whose instance the attachment issued for that purpose applying to the Court on motion.

The following are the forms of the returns to be indorsed on the writ:—

Forms of sheriff’s return of execution of writ.

“ I have attached the within-named C. D., whose body remains in Her Majesty’s gaol for my county of
“ under my custody.

“ The answer of X. Y., Esquire, Sheriff.”

“ I have attached the within-named C. D., as within I am commanded, whose body I have ready.

“ The answer of X. Y., Esquire, Sheriff.”

“ The within-named C. D. is not found within my bailiwick.

“ The answer of X. Y., Esquire, Sheriff.”

Where this last return is made the party at whose instance the attachment issued may either issue an attachment into another county, or he may obtain an order for the serjeant-at-arms to arrest the defendant. Gen. Ord. Jan. 1870, rule 6; Dan. Pr. 395, 418, 910.

The application for an order for the serjeant-at-arms is ex parte by motion supported by the production of the attachment and the sheriff’s return. Dan. Pr. 910. “ The registrar will upon registration draw up the order and deliver it to the serjeant-at-arms or his deputy.” Cons. Order XXXII.

Form of order
for warrant
to issue to
serjeant-at-
arms.

The following is the form of the order for a warrant to the serjeant-at-arms on a return *non est inventus* (Gen. Ord. 7th Jan. 1870, rule 6):—

“Whereas by the decree (judgment *or* order) dated _____, it was ordered _____ now upon motion by counsel who alleged that an attachment issued against the said C. D. for not, &c. (*state default*), directed to the sheriff of _____, and that the sheriff hath returned *non est inventus* therein, and upon reading the decree, &c., writ and return, this Court doth order that the serjeant-at-arms attending this Court do apprehend the said C. D. and bring him to the bar of this Court to answer his said contempt; and thereupon such further order shall be made as shall be just.” See Seton’s Forms, 4th ed., p. 1572.

Form of Lord
Chancellor’s
warrant to
serjeant-at-
arms.

The serjeant-at-arms then obtains the Lord Chancellor’s warrant, which is in the following form:—

“Whereas by an order bearing date the _____ day of _____, made in a certain action wherein A. B. is plaintiff and C. D. is the defendant, it was ordered that the tipstaff do apprehend the defendant C. D., and bring him to the bar: These are therefore, in pursuance of the said order, to will and require you forthwith upon receipt hereof to make diligent search and inquiry after the said C. D., and wheresoever you shall find him to arrest and apprehend him and bring him to the bar of this Court, to answer his contempt in the said order mentioned; willing and requiring all and singular mayors, sheriffs, justices of the peace, bailiffs, constables, jailors, headboroughs, and all other Her Majesty’s officers and loving subjects, to be aiding in the execution of the premises, as they tender Her Majesty’s service, and will answer the contrary at their peril, and this shall be your warrant.

“Dated this _____ day of _____, 18 _____,
“ _____.

“To Mr. X. Y., the tipstaff attending the
“Chancery Division of the High Court
“of Justice, *or his deputy*.”

If the tipstaff arrests the party to be attached he should bring him to the bar of the Court, and the applicant must move that he be turned over to the Holloway Prison. This order is of course. Upon the order being made the party attached is conveyed to prison,—where he may be left until he clears his contempt. See “Seton on Decrees.”

If the tipstaff finds the party to be attached in prison, he may be left there until he has cleared his contempt.

A writ of attachment, if unexecuted, remains in force for one year only from the date of its issue—unless renewed—and the four following rules relate to the renewal and execution of a writ at the expiration of the time for its original execution:—

“A writ of execution, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a judge, be renewed, by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.”

Order XLII. R. 16.

Ord. 42, r. 16.
Currency and renewal of writ of attachment.

“The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.”

Order XLIII. R. 17.

Ord. 42, r. 17.
Proof of renewal of writ.

“As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.”

Order XLII. R. 18.

Ord. 42, r. 18.
Execution of writ within six years.

“Where six years have elapsed since the judgment, or

Ord. 42, r. 19.

Execution of writ after six years, or change of parties.

“ any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall seem just.” Order XLII. R. 19.

The three next rules contain general instructions relating to writs of attachment :—

Ord. 42, r. 21.
How orders enforced against third parties.

“ In cases other than those mentioned in Rule 18, any person not being a party in an action, who obtained any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the action ; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action.” Order XLII. R. 21.

Ord. 42, r. 23.
Saving of previous rights.

Nothing in any of the rules of this order shall take away or curtail any right heretofore existing, to enforce or give effect to any judgment or order in any manner, or against any person or property whatsoever.” Order XLII. R. 23.

Ord. 42, r. 24.
Order of writs.

“ Nothing in this order shall affect the order in which writs of execution may be issued.” Order XLII. R. 24.

Applications for discharge of the party attached.

The party attached may apply for his or her discharge to the judge, if the Court be then sitting ; if not, then to one of the registrars, who, for good cause shown, shall have power to order such discharge (Rule 109) on three grounds : either upon the ground that the attachment was irregular and ought not to have issued, or that the party

attached has cleared his contempt, or that he is entitled to be discharged under sect. 4 of the Debtors Act, 1869, without having paid the sum ordered, by reason of his having been in prison for the contempt for one year.

An application for a discharge on the ground of irregularity in the proceeding should be supported by an affidavit of the facts upon which it is founded, and the party at whose instance the applicant was attached should have notice of the application.

When the act to be done was a payment of money into Court, or the filing of an affidavit, the application for a discharge is *ex parte* by motion, and must be supported by a certificate of the proper officer of the Court of the performance of the act.

Thus sect. 5 of the Debtors Act, 1869, provides that Sect. 5 of
Debtors Act,
1869.
“Any person imprisoned under this section shall be discharged out of custody upon a certificate, signed in the prescribed manner, as to the effect that he has satisfied the debt or instalment of a debt in respect of which he was imprisoned, together with the prescribed costs (if any).”

In other cases the application is by motion on notice to the party who issued the attachment, and, unless he consents, it should be supported by an affidavit of compliance with the judgment or order, or in cases within sect. 4 of the Debtors Act, 1869, of the lapse of a year since the imprisonment commenced.

Upon the person attached clearing his contempt, he cannot be detained in custody for non-payment of the costs of his contempt. Part of the order for his discharge will be, that he pay the costs of his contempt and of the application to discharge him, leaving the other party to enforce payment of such costs in the usual manner. *Jackson v. Mauby*, 1 Ch. Div. 86. Party attached not to be detained in custody for costs of attachment.

REGULATIONS AS TO MOTIONS.

Time for
hearing
motions.

The Court hears motions by counsel every Tuesday during the Sittings, at 12 p.m.

During the long vacation the registrars sitting for the judge hear motions by counsel every Wednesday fortnight, at 12 p.m.

Cases and
papers for
motions.

Papers for motions are required to be left in the principal registry with the clerk of the papers before 2 o'clock p.m. on the Thursday previous, if the motion is to be made in Court; and before 2 p.m. on the Saturday previous, if the motion is to be made before the registrars in the long vacation.

Cases for motion and all affidavits and notices should be headed "In the goods of A. B., deceased."

Instructions
for framing
case for
motion.

"Cases for motion are to set forth the style and object of, and the names and descriptions of, the parties to the action or proceeding before the Court; the proceedings already had in the action, and the dates of the same; the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded." R. 124.

The following is a form of a case for motion or motion paper:—

"In the High Court of Justice.

"Probate, Divorce and Admiralty Division.

"Probate.

"Between A. B. Plaintiff,
and

"C. D. Defendant.

"In the goods of E. F., deceased.

"E. F., late of , died on the day of ,
18 , at , intestate, without child or parent, leaving
the said C. D. his lawful widow and relict, and the said
A. B. his natural and lawful brother and only next of
kin.

"The said C. D., having deferred taking upon her
letters of administration of the personal estate and effects

“ of the said deceased, the said A. B., on the day
 “ of 18 , extracted a citation, under seal of this
 “ Honorable Court, against her the said C. D., to accept or
 “ refuse letters of administration of the personal estate and
 “ effects of the said deceased, or show cause why the same
 “ should not be granted to him the said A. B.

“ This citation was afterwards, viz., on the day
 “ of , 18 , personally served on the said C. D., and
 “ was on the day of , 18 , returned to this
 “ Honorable Court.

“ No appearance has been given to the said citation.

“ The above averments are proved by affidavits.

“ The Court will be moved by counsel to decree letters
 “ of administration of all and singular the personal estate
 “ and effects of the said deceased to be granted to the said
 “ A. B.”

“ If the cases tendered are deficient in any of the above
 “ particulars, the same shall not be received in the registry
 “ without permission of one of the registrars.” R. 125.

Defective
cases on
motion.

“ On depositing the same in the registry, and giving
 “ notice of the motion, the affidavits in support of the
 “ motion, and all original documents referred to in such
 “ affidavits, or to be referred to by counsel on the hearing
 “ of the motion, must be also left in the registry; or in
 “ case such affidavits or documents have been already filed
 “ or deposited in the registry, the same must be searched
 “ for, looked up, and deposited with the proper clerk, in
 “ order to their being sent with the case to the judge.”
 R. 126.

Affidavits in
support of
motion to be
left in re-
gistry.

A case for motion should comprise no statement which
 does not appear either on the minutes of the Court, or in
 the affidavits or documents filed in support of the motion.

The following forms of the terms in which the Court in
 certain cases should be moved to make its decree will be of
 use in practice:—

Forms of
terms of
motions.

The Court will be moved:—

“ To decree probate of the last will and testament of
 Probate to an
executor.

“To decree probate of the last will and testament of E. F., late of , deceased, the wife of A. B., to be granted to G. H., the executor named therein, limited to such property as she was entitled to appoint or dispose of by will under and by virtue of the last will and testament dated, &c., of X. Y., or of any other power enabling her in that behalf, so far as she has in and by her said will appointed and disposed of accordingly, but not further or otherwise.”

Limited probate of a married woman's will.

Where the application is for a grant save and except any particular fund forming part of the personal estate of the deceased, but which from the circumstances pass under another grant, which other grant has not been obtained, the grant is called “A Probate or Administration save and except.” Thus if a testator has appointed an executor for a special fund, and another executor for the rest of his personal estate, the terms of the motion will be for the grant save and except.

Grants save and except.

“To decree probate of the last will and testament of A. B. late of , deceased, to C. D., one of his executors named therein, save and except in so far as his said last will and testament relates to any personal estate of which he appointed E. F. sole executor.”

Where the application is for a *cæterorum* grant, which differs from a grant save and except, in that it follows instead of precedes, as the grant save and except does, a limited grant, the terms of the motion will be—

Cæterorum grants.

“To decree a grant of letters of administration of the rest of the personal estate and effects of E. F., late of deceased, the wife of A. B., save and except any personal estate which the said E. F., under and by virtue of the powers contained in the last will and testament, dated, &c., of X. Y., late of deceased, or of any other power enabling her in that behalf, had power by her last will and testament to appoint or dispose of, and by her last will and testament, dated, &c., appointed or disposed of accordingly.”

A cessate
grant.

Where an original grant has been limited for a specified time or until the happening of a contingency, a second or supplemental grant, which is commonly called a cessate grant, should be applied for. Thus where probate has been granted of a copy of a will limited until the original will or an authentic copy thereof shall be brought into the registry, the grant ceases on the original or a more authentic copy thereof being discovered and brought into the registry.

Thus also where probate or administration has been granted to a guardian during the minority of a person entitled to the grant, or to the committee or curator of a lunatic during his lunacy, or to an attorney for the use and benefit of the party entitled, who is abroad, until he shall apply for and obtain the grant himself, a cessate or supplemental grant will be issued. Unless, however, there is something exceptional in the circumstances of the case, a cessate grant will be issued by the registrar without the necessity of an application to the Court.

The following rules of practice and rules of Court relate to the notices to be given of motions, and the documents to be filed, and the affidavits to be used in support of them :—

Notices of
motion.

All parties who have entered an appearance in a matter, whether in obedience to the warning of a caveat, or to a citation, or of his own motion, is entitled to four clear days' notice previous to the hearing of the motion.

Notice of
motion to
other parties.

“ When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the other parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the judge, or of the registrars in his absence.” R. 111.

Rule as to
service of
notices.

“ It shall be sufficient to leave all notices and copies of pleadings and other instruments which by the rules

“ and orders of the Court are required to be given or
 “ delivered to the opposite parties in a cause, or to their
 “ proctors, solicitors, or attorneys, and personal service of
 “ which is not expressly required, at the address furnished
 “ by such parties respectively.” R. 110.

In cases where the deceased has died a bastard or without known relations, the Queen’s Proctor is entitled to have notice of any application to be made for a grant of administration to his or her estate.

Notices of motions to Queen’s Proctor.

“ In all cases where application is made for letters of
 “ administration, either with or without a will annexed, of
 “ the goods of a bastard dying a bachelor, or a spinster, or
 “ a widower, or widow without issue, or of a person dying
 “ without known relations, notice of such application is to
 “ be given to her majesty’s Procurator General, or in case
 “ the deceased died domiciled within the duchy of Lancaster, to the solicitor for the duchy in London, in order
 “ that he may determine whether he will interfere on the
 “ part of the crown; and no grant is to be issued until the
 “ officer of the crown has signified the course which he
 “ thinks proper to take.” R. 75, N. C.

The Queen’s Proctor to have notice of applications for grants where deceased has died a bastard or without known relations.

“ In the case of persons dying intestate without any
 “ known relation, a citation must be issued against the
 “ next-of-kin, if any, and all persons having or pretending
 “ to have any interest in the personal estate of the
 “ deceased, and the service thereof upon them shall be
 “ effected as required by Rule 70. Such citation must
 “ also be served upon the Queen’s Proctor, or upon the
 “ solicitor for the duchy of Lancaster, as the case may
 “ require.” R. 76, N. C.

Where deceased had no known relation, citation to issue.

Where a decree or order has been obtained without due notice to the opposite parties, it may be rescinded under the following rule :—

“ If an order be obtained on motion without due notice
 “ to the opposite parties, such order will be rescinded, on
 “ the application of the parties upon whom the notice
 “ should have been served; and the expense of and arising

Order may be rescinded if obtained without due notice to opposite party.

“ from the rescinding of such order shall fall on the party
 “ who obtained it, unless the judge shall otherwise direct.”
 R. 112.

In motions for a grant to a person having an inferior title to it, or on presumptive evidence of death, the following instruments and affidavits are required :—

I. Where application is made for a grant by a person having an inferior title to it—

Practice
 where parties
 have re-
 nounced.

(a) If the applicant relies in part (a) on the renunciation of a person having a superior title to the grant, the instrument of renunciation should be filed with the case for motion, and the facts recited in the renunciation should be verified by affidavit.

*Form of Renunciation of Probate and Administration, with
 Will annexed.*

Renunciation
 of probate
 and adminis-
 tration, with
 will annexed.

“ In the High Court of Justice.

“ Probate, Divorce, and Admiralty Division.

“ (Probate.) The Principal Registry.

“ In the goods of deceased.

“ Whereas A. B., late of , in the county of
 “ deceased, died on the day of 18 , at
 “ having made and duly executed his last will and testa-
 “ ment, bearing date the day of , 18 , and
 “ thereof appointed C. D. executor and residuary legatee
 “ in trust :

“ Now I, the said C. D., do hereby declare, that I have
 “ not intermeddled in the personal estate and effects of the
 “ said deceased, and will not hereafter intermeddle therein
 “ with intent to defraud creditors, and I do hereby re-
 “ nounce all my right and title to the probate and execu-
 “ tion of the said will, and to the letters of administration,

(a) If all parties having a superior title to the grant renounce their right to it, the grant will issue as of course in the registry to a party next entitled to it.

“with the said will annexed, of the personal estate and effects of the said deceased.

“Signed by the said C. D. this
 “day of , 18 , in the pre- } (Signed)
 “sence of . C. D.”

(b) If the applicant relies on the fact that parties who had a superior title to the grant have been cited and have not appeared, there should be filed in the registry— Practice where parties have been cited.

1. The citation, with a certificate of service indorsed thereon. [For Form, see *post*, p. 56.]
2. An affidavit of service of the citation. [For Form, see *post*, p. 59.]
3. An affidavit of search having been made in the appearance book in the registry after the expiration of the time named in the citation for entering an appearance and of non-appearance. [For Form, see *post*, p. 60.]

The facts deposed to in the affidavit filed to lead the citation may be referred to in support of the application, and any additional facts necessary for the motion should be supplemented in further affidavits.

II. Where the proof of the death of the deceased is presumptive in consequence of his sudden disappearance, or of his not having been heard of for seven years, the applicant's affidavit of the facts on which the Court is asked to presume the death should be corroborated in some material points by a member or friend of the deceased's family, who is not interested in the estate. The circumstance of the family or friends of a man whose habit was to communicate with them receiving no communication from or of him for seven years, leads to the presumption of his death at some time during the seven years, but not at the beginning or at the end of the seven years (*In the goods of How*, 1 S. & T. 53; 27 L. J. 37), provided there is no assignable cause for the cessation of his communications. The mere fact, however, that he has not been heard of for seven years, where it was not his Practice in cases of persons having disappeared, or not having been heard of.

practice to communicate, does not lead to such an inference, but it may, coupled with other circumstances, induce the Court to act on the presumption of his death.

Practice in cases of persons supposed to have been lost at sea.

III. Where the proof of the death of the deceased is presumptive in consequence of the disappearance at sea of the vessel on which he was on board, and of the absence of tidings of those who were on board her, evidence of the following facts is required :—

- (1) That the deceased was on board when the vessel sailed from her last port. In proof of this it is usual to annex to an affidavit the last letter written on board by the deceased.
- (2) The date and place when and where the vessel was last seen.
- (3) Her non-arrival in the port to which she was bound within reasonable time.
- (4) Absence of tidings of the vessel from the date when she was last seen.
- (5) That the ship and cargo were either insured or uninsured, and if insured, that the underwriters have paid on the policies as for a total loss.

The application should be supported by an affidavit of the owner, managing owner or agent of the ship, deposing to all material facts bearing on the case within his knowledge, as well as by that of the applicant, and by other affidavits, when the circumstances of the case require it.

Practice as to cases referred to Court from district registries.

The district registrars are required in every case of doubt or difficulty to communicate with the registrars of the principal registry, and if the principal registrar is of opinion that the question is one proper for the determination of the judge on motion, he will direct the district registrar to intimate to the applicant that the grant cannot issue except under decree of the Court obtained on motion. R. 98, District Registry.

Transmission of papers for motions from district registry.

The following rule relates to the transmission of papers in such cases :—

“ When motions are to be made before the judge in

“ Court, with regard to any application for probate or administration at a district registry, the district registrar is to transmit all original papers and documents to the principal registry, and the same, after the directions of the Court have been taken, will, on the application of the parties, be returned to the district registrar together with an office copy of the decree of the judge.” R. 90, District Registry.

Parties entitled to notice of motion are also entitled to be furnished with copies of the affidavits and documents to be used in support of the motion under the following rule :

Copies of affidavits to be furnished to other parties.

“ Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the other parties to the suit, who are entitled to be heard in opposition thereto.” R. 127.

The hearing of the motion may, with the leave of the Court, be adjourned to enable the opposite parties to file affidavits in answer.

In framing affidavits to be used in Court the following rules should be complied with :—

Rules as to affidavits.

“ Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent making it is to be inserted therein.” R. 80.

Affidavits to be drawn in the first person.

“ In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.” R. 81.

Names of two or more deponents to be inserted in jurat.

“ No affidavit will be admitted in any matter in the Court of Probate of which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure.” R. 53, N. C.

No material matter to be written on an erasure. No interlineation or erasure in jurat.

“ Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other authority before whom such affidavit is made, is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also

Special form of jurat where deponent blind or illiterate.

“made his or her mark, or wrote his or her signature, in the presence of the registrar, commissioner, or other authority before whom the affidavit is made.” R. 83.

“No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before a partner or clerk of his proctor, solicitor, or attorney.” R. 84.

“Proctors, solicitors and attorneys, and their clerks respectively, if acting for any other proctor, solicitor or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.” R. 56, N. C.

Where deponent subscribing witness to will to depose to its due execution.

“In every case where an affidavit is made by a subscribing witness to a will or codicil, such subscribing witness shall depose as to the mode in which the said will or codicil was executed and attested.” R. 57, N. C.

Where affidavit not legible, or an interlineation not indicated, not to be filed without leave of judge.

“The registrars are not to allow any affidavit to be filed (unless by leave of the judge) which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the commissioner, or other person before whom it was sworn.” R. 58, N. C.

Affidavits filed after time not to be used without leave of judge.

“Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used in Court, unless by leave of the judge.” R. 86.

Applicants for letters of administration should be described in affidavits as follows:—

Descriptions of persons applying for administrations.

A husband, as “the lawful husband.”

A wife . . . “the lawful widow and relict.”

A father, . . . “the natural and lawful father and next-of-kin.”

A mother, . . . “the natural and lawful mother and only next-of-kin.”

A child . . . “the natural and lawful and only child, and only next-of-kin,” or “one of the

natural and lawful children and next-of-kin."

A brother, as "the natural and lawful brother."

A sister, ,, "the natural and lawful sister."

If there be no parents living, the brother or sister is further to be described as "one of the next-of-kin," or "the only next-of-kin."

A nephew, as "the lawful nephew." } and "one of the" or

A niece ,, "the lawful niece." } "only next-of-kin."

If a brother or sister be living, and the nephew or niece, being the child of a brother or sister of the intestate, who died in his life-time, apply for administration, he or she is to be described as "one of the persons entitled in distribution to the personal estate and effects of the deceased."

A grand-parent, grandchild, cousin, &c., is to be described as "lawful," and "one of the next-of-kin," or "only next-of-kin."

Affidavits in all matters, proceedings or actions in the Probate Division may be sworn before the following persons:—In England, before the principal registrars, the district registrars, the surrogates of any ecclesiastical Court in England who were acting as such at the time of the Court of Probate Act, 1857, coming into operation on January 11th, 1858, commissioners for taking oaths in Chancery, commissioners specially appointed to take oaths by the judge of the Court of Probate, and commissioners appointed by the Lord Chancellor to take oaths or affidavits in the High Court of Justice (Judicature Act, 1873, s. 77).

Persons before whom affidavits may be sworn in probate division in England;

In Ireland and Scotland, before any Court, judge, notary public or person lawfully authorized to administer oaths in Ireland or Scotland. in Ireland and Scotland;

In the Isle of Man and in the Channel Islands, before any commissary, ecclesiastical judge or surrogate who at the time of the passing of the Court of Probate Act, 1857 (25th August, 1857), was there authorized to administer in Isle of Man and Channel Islands;

oaths before any solicitor practising in the Isle of Man or Channel Islands whom the judge of the Court of Probate may appoint. Also in the Channel Islands before any Court, judge, notary public, or person lawfully authorized to administer oaths in such colonies, islands, plantations or places respectively.

in foreign
parts.

Affidavits and oaths may be taken in foreign parts out of her Majesty's dominions by the following persons, viz. : 1. Consuls-general. 2. Consuls. 3. Ambassadors. 4. Ministers. 5. Envoys. 6. Chargés d'affaires. 7. Secretaries of embassy. 8. Secretaries of legation. 9. Vice-consuls. 10. Acting consuls. 11. Pro-consuls. 12. Consular agents. But if there are no such persons as these, then by :—13. Foreign local magistrates or other person having authority to administer an oath ; in the latter case, it should appear on the affidavit or oath, that there were no such persons as those before designated at the place where the oath was administered. (*In the goods of Bernard*, 2 S. & T. 489 ; 31 L. J. 89. See an exception *In the goods of Lambert*, 35 L. J. 64 ; 1 L. R. 138.)

The authority to administer oaths in the Probate Court, and, by the Judicature Act, 1873, in the Probate Division, was conferred by the following sections of the Court of Probate Act, 1857, and Court of Probate Act, 1858 :

The Court of Probate Act, 1857, s. 27. Registrar, &c. to have power to administer oaths. Power to appoint also commissioners to administer oaths, &c.

“ The registrars and district registrars shall respectively
“ have full power to administer oaths ; and all persons
“ who at the commencement of this Act shall be acting as
“ surrogates of any ecclesiastical Court, and any other
“ persons whom the judge shall, under the seal of the
“ Court, from time to time appoint, shall respectively have
“ full power to administer oaths and perform such other
“ duties in reference to matters and causes testamentary as
“ may be assigned to them from time to time by the rules
“ and orders under this Act ; and the persons so appointed
“ shall be styled ‘ Commissioners of her Majesty’s Court of
“ ‘ Probate : ’ provided, that any party required to be ex-
“ amined, or any person called as a witness, or required or

“ desiring to make an affidavit or deposition under or for
 “ the purposes of this Act, shall be permitted to make his
 “ solemn affirmation or declaration instead of being sworn
 “ in the circumstances and manner in which a person called
 “ as a witness or desiring to make an affidavit or deposition
 “ would be permitted so to do under the Common Law
 “ Procedure Act, 1854, in cases within the provisions of
 “ that Act; and any person who shall wilfully give false
 “ evidence, or who shall wilfully swear, affirm or declare
 “ falsely in any affidavit or deposition before the Court of
 “ Probate, or before any registrar, district registrar, or
 “ commissioner of the Court, shall be liable to the penalties
 “ and consequences of wilful and corrupt perjury.”—
 Sect. 27.

“ It shall be lawful for the judge of the Court of
 “ Probate to appoint, by commission under seal of the
 “ Court, any persons practising as solicitors in the Isle of
 “ Man, in the Channel Islands, or any of them, to ad-
 “ minister oaths, and to take declarations or affirmations,
 “ and to exercise any other powers which can be exercised
 “ by commissioners of her Majesty’s Court of Probate, and
 “ such persons shall be entitled from time to time to charge
 “ and take such fees as any other persons performing the
 “ same duties in the Court of Probate may charge and
 “ take.” Sect. 30.

Court of Pro-
bate Act,
1858.

Commis-
sioners may
be appointed
in the Isle of
Man, &c.

“ In cases where it is necessary to obtain affidavits,
 “ declarations, or affirmations to be used in the Court of
 “ Probate from persons residing in foreign parts out of her
 “ Majesty’s dominions, the same may be sworn, declared
 “ or affirmed before the persons empowered to administer
 “ oaths under the act of the sixth of George the Fourth,
 “ chapter eighty-seven, or under the Act of the eighteenth
 “ and nineteenth of Victoria, chapter forty-two; provided
 “ that, in places where there are no such persons as are
 “ mentioned in the said Acts, such affidavits, declarations
 “ or affirmations may be made, declared, and affirmed be-

Affidavits,
before whom
to be sworn
when parties
making them
reside in
foreign parts

“fore any foreign local magistrate or other person having authority to administer an oath.” Sect. 31.

Affidavits,
before whom
to be sworn in
Scotland, Ire-
land, &c.

“Affidavits, declarations, and affirmations to be used in the Court of Probate, may be sworn and taken in Scotland, Ireland, the Isle of Man, the Channel Islands, or any colony, island, plantation, or place out of England under the dominion of her Majesty, before any court, judge, notary public, or person lawfully authorised to administer oaths in such country, colony, island, plantation or place respectively, or, so far as relates to the Isle of Man and the Channel Islands, before any commissary, ecclesiastical judge or surrogate, who at the time of the passing of The Court of Probate Act was authorized to administer oaths in the Isle of Man or in the Channel Islands respectively, and all registrars and other officers of the Court of Probate shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, or person, which shall be attached, suspended or subscribed to any such affidavit, declaration, or affirmation, or to any other document.” Sect. 32.

After hearing counsel in support of, and if necessary also in opposition to the motion, the Court makes its decree or order thereon, which is entered up in the Court Minute Book.

When a decree or order of the Court has been obtained, and it is necessary for any purpose to serve the same on any party, the service shall be effected in the manner prescribed by the following rule:—

“When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the commissioner or other person before whom the affidavit is sworn.” R. 113.

Mode of service of an order or a decree of the Court on a party affected thereby.

Practice

If the application for the grant came through a district

registrar, and the Court decides that the grant may go, the grant may issue in the district registry, unless the judge shall direct that it issue in the principal registry.

“After motions have been made before the judge in Court, the registrars are, on the application of the parties (unless the judge shall otherwise direct) to transmit to a district registrar the original papers and documents, in order that the grant of probate or administration may be completed in a district registry.” R. 77, N. C.

where decree made in respect of an application coming through district registry. Transmission of papers to district registry after motion.

A declaration of the personal estate of the deceased, and the justification of the sureties to the administration bond are required in the following case:—

“When any person takes letters of administration in default of the appearance of the person cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal estate and effects of the deceased must be filed in the registry, and the sureties to the administration bond must justify.” R. 42, N. C.

Precautions when parties cited not personally served, or party entitled to estate a lunatic.

Where there is a limited or special grant of administration decreed the following regulations apply:—

“In all cases of limited or special administration two sureties are to be required for the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant. The alleged value of such property is to be verified by affidavit if required.” R. 39, N. C.

“The administration bond is, in all cases of limited or special administrations, to be prepared in the registry.” R. 40, N. C.

CHAPTER II.

CAVEATS—WARNING TO CAVEATS—SERVICE OF WARNING—
 APPEARANCE TO WARNING—EFFECT OF NON-APPEARANCE
 —FORM OF AFFIDAVIT OF SEARCH AND OF NON-APPEAR-
 ANCE—OBJECTS OF ENTERING CAVEATS—DISTRICT REGIS-
 TRAR “NOT TO PROCEED WHILST THERE IS CONTENTION.”

Caveat de-
 fined.

A CAVEAT is a warning in writing lodged in the principal probate registry, or in a district probate registry, giving notice to the registrar not to issue any grant, or to take any step in reference to the personal estate of the deceased named in the warning, without notice being first given to the party, or to the solicitor of the party, who has lodged the caveat.

No grant to
 issue after
 caveat lodged
 without
 notice to
 caveator.

After the entry of a caveat no grant should issue without such notice, and if it issues *per incuriam* it is liable to be recalled and revoked. But by R. 62, N. C., “No caveat shall affect any grant made on the day on which the caveat is entered, or on the day on which notice is received of a caveat having been entered in a district registry,” “or in the principal registry.” R. 75, D. R.

A caveat may be entered in the principal or in a district registry by any person having an interest, or asserting an interest, in the deceased’s estate. “Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor or attorney, enter a caveat in the principal registry, or in a district registry; if in the principal registry, the person entering the caveat must also insert the name of the deceased in the index to the caveat book.” R. 59, N. C.

“ A caveat shall bear date on the day it is entered, and
“ shall remain in force for the space of six months only,
“ and then expire and be of no effect ; but caveats may be
“ renewed from time to time.” R. 60, N. C.

Form of Cariat.

“ In the High Court of Justice.

“ Probate, Divorce, and Admiralty Division.

“ (Probate.) The Principal Registry.

“ Let nothing be done in the goods of A. B. late of
“ deceased, who died on the day of ,
“ at , unknown to C. D. of having interest [*or*
“ to E. F. of , *solicitor of parties having interest*].

“ Dated this day of , 18 .

“(Signed) C. D. of [or E. F. of _____,
“solicitor of parties having interest].”

“Where a caveat has been entered in the principal
“registry, the registrars shall immediately thereupon
“send notice thereof to the district registrar of any district
“in which it is alleged the deceased resided at the time of
“his death, or in which he is known to have had a fixed
“place of abode at the time of his death.” R. 61, N. C.

Notice of
caveat to dis-
trict registrar
of district of
deceased's
residence.

“ Where a caveat has been lodged in a district registry,
 “ the district registrar shall immediately thereupon send a
 “ copy thereof to the registrars of the principal registry,
 “ and also to the registrars of any other district in which
 “ it is alleged the deceased resided at the time of his death,
 “ or in which he is known to have had a fixed place of
 “ abode at the time of his death.” R. 74, D. R.

Copies of
caveat to be
sent by dis-
trict registrar
to principal
registry, &c.

A person whose application for a grant is stopped by a caveat should apply at the registry for a form of summons against the caveator called “a warning.”

[*Form of Warning.*

“ It shall be sufficient for the warning of a caveat that
 “ a registrar send by the public post a warning signed by
 “ himself, and directed to the person who entered the
 “ caveat, at the address mentioned in it.” R. 64, N. C.

“ The warning to a caveat is to state the name and
 “ interest of the party on whose behalf the same is issued,
 “ and if such person claims under a will or codicil, is also
 “ to state the date of such will or codicil, and is to contain
 “ an address within three miles of the general post office,
 “ at which any notice requiring service may be left. A
 “ form of warning will be supplied in the registry.”
 R. 65, N. C.

Warning to
give name and
interest of
party serving
it.

The time for appearing to a warning is six days after
 service exclusive of Sunday, Christmas Day and Good
 Friday.

If no appearance is entered by or on behalf of the
 caveator, the grant will issue to the applicant upon affi-
 davits of the service of the warning, and of search, and of
 non-appearance.

Where no ap-
pearance to
warning
grant issues
subject to
affidavits
being filed.

“ In order to clear off a caveat when no appearance has
 “ been entered to a warning duly served, an affidavit of
 “ the service of the warning, stating the manner of service,
 “ and an affidavit of search for appearance and of non-
 “ appearance, must be filed.” R. 67, N. C.

Form of Affidavit.

“ In the High Court of Justice,

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ The Principal Registry.

“ In the goods of A. B., deceased.

“ I, C. D., of clerk to of solicitor,
 “ make oath and say as follows:

Affidavit of
service of
warning and
of search and
non-appear-
ance.

“ 1. On the day of 18 , I duly served
 “ Messrs. of with a true copy of the warning
 “ now hereunto annexed marked A., by delivering to and
 “ leaving the same copy with a clerk of the said Messrs.

T.

E

“ at their office aforesaid [*or leaving the same*
 “ at their office aforesaid].

“ 2. I did on the day of 18 , duly and
 “ carefully search the book kept in the principal registry
 “ of this Honorable Court for entering appearances from
 “ the said day of 18 [*day of service*], to the
 “ present day inclusive, to ascertain whether or not any
 “ appearance to the said warning had been entered.

“ 3. No appearance to the said warning has been entered
 “ either by or on behalf of any person or persons whomso-
 “ ever.

“ Sworn at this
 “ day of 18 , } “ (Signed) C. D.”
 “ before me, . }

Where
 caveator ap-
 pears he may
 consent to or
 contest the
 grant.

If the caveator appears, no grant can issue until the caveat has been subducted or withdrawn by him, or unless he signs a consent to the grant issuing, or unless an order is made by the judge on summons or on motion adverse to the caveator.

The caveator may enter an appearance after the expiration of the time named in the warning, provided the grant has not passed the seal.

The form of entering appearances for caveats and citations is prescribed by the following order:—

“ It is ordered by the registrars—

“ That all entries of appearance to citations and caveats
 “ with a view to the commencement of contentious pro-
 “ ceedings shall set forth the name in full and the interest
 “ of the person or persons for whom the appearance is
 “ entered.

“ That without the order of the judge or permission in
 “ writing of one of the registrars no such appearance shall
 “ be entered for any person claiming an interest other
 “ than the following:—

“ 1. Executor. 2. Legatee (specific, pecuniary, or re-
 “ siduary), in trust or beneficial. 3. Next of kin. 4. One

“ of the persons entitled in distribution in case of an in-
 “ testacy. 5. Executor or administrator of a beneficial
 “ legatee, next of kin, or person entitled in distribution
 “ who survived the testator or intestate but is since dead.
 “ 6. Creditor. 7. Executor or administrator of a creditor.
 “ 8. The husband of any person claiming an interest in
 “ any of the above characters.

“ That the appearance entered on behalf of an executor
 “ or legatee, or the representative of a legatee, shall state
 “ the date of the will or codicil under which he or she
 “ claims an interest.

“ That the appearance entered for a next of kin or person
 “ entitled in distribution, or the representative of a next
 “ of kin or person so entitled, shall set forth the relation-
 “ ship of such next of kin or person entitled to the testator
 “ or intestate.

“ That an appearance entered to a citation to see pro-
 “ ceedings shall set forth the interest in respect of which
 “ the party is cited.

“ That the clerk in charge of the appearance book be
 “ authorized to cancel any appearance the entry of which
 “ is not made in conformity with this order.”

Form of Appearance to a Caveat or a Citation.

The appearance to be Indexed. See directions, ante, p. 50.

_____	{	State date of caveat if appearance to warning.
	{	State date of citation if appearance to citation.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate).

Appearance to _____

“ Name _____

Residence of deceased _____

“ Plaintiff’s name and
 “ interest in full.

against { Defendant’s name in
 full.

“ _____ } “ _____

“ Name and address of plaintiff’s solicitor _____.

“ [Name of defendant’s solicitor] ————, appears
 “ for defendant.
 “ Set forth defendant’s } ————
 “ name and interest } ————
 “ Name of party or solicitor entering ap- }
 “ pearance. Address within three miles } ————.
 “ of Temple Bar.
 “ Date of appearance ————. ”

Purposes for
 which a
 caveat may be
 entered.

There are four objects for which a caveat may be entered, (1) To give time to the caveator to make inquiries and to obtain such information as may enable him to determine whether or not there are grounds for his opposing the grant: (2) To give him an opportunity of raising any question arising in respect to the grant before the judge either on summons or on motion: (3) To enable the caveator to apply for an order that the sureties for an administrator shall justify, or that they shall be resident within the jurisdiction of the Court, or that the administrator shall exhibit an inventory or give a bond to pay creditors *pro rata*; and a grant will not by the present practice issue to a creditor, unless he consents, if required by the Court, without regard to the presence or absence of other creditors, to pay all debts *pro rata*; *In the goods of Brackenbury*, 2 P. Div. 272; 46 L. J. 42: (4) As a step preliminary to the commencement of an action between the caveator, and the party warning the caveat. The warning and the entry of an appearance by the caveator will disclose the names and address of either party to the other, and their respective interests in the estate of the deceased, and with this information it is open to either, if their interests are conflicting, to commence an action against the other for the purpose of establishing his claim to the grant.

District registrar not to proceed with grant whilst caveat in force or there is contention.

Where an application is made for a grant in a district registry, “after a caveat has been entered, the district
 “ registrar is not to proceed with the grant of probate or
 “ administration to which it relates, until it has expired or

“ been subducted, or until he has received notice from the
“ principal registry that the caveat has been warned and
“ no appearance given, or that the contentious proceedings
“ consequent on the caveat have terminated.” R. 77,
D. R.

This rule is in furtherance of the provisions of sect. 48 of the Court of Probate Act, 1857. “ The district registrar shall not grant probate or administration in any case in which there is contention as to the grant, until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form.”

District registrar not to make grants where there is contention.

CHAPTER III.

CITATION—AFFIDAVIT TO LEAD CITATION—PRECIPES—ENTRY OF CAVEAT—FORM OF CITATION—MODES OF SERVICE OF CITATION—PERSONAL SERVICE—SUBSTITUTIONAL SERVICE—FORM OF ABSTRACT OF CITATION—SERVICE ON A FEME COVERTE—ON MINORS—ON LUNATICS—AFFIDAVIT OF SERVICE—APPEARANCE—AFFIDAVIT OF SEARCH AND NON-APPEARANCE.

Citation.

A CITATION is an instrument issuing from the probate registry under the seal of the Court, and signed by one of the principal registrars, containing a recital of the cause of its issuing, of the interest of the party extracting the same, and giving notice to the party cited to enter an appearance and take the steps therein specified, with an intimation of the nature of the decree the Court is asked to and may make unless good cause is shown to the contrary.

When used in Probate Division.

A citation was one of the modes of commencing a suit in the Ecclesiastical Courts, answering in those Courts to a writ of summons at common law. It was adopted as one of the modes of commencing a suit in the Probate Court, and is still retained by the practice of the Probate Division as the mode of giving notice in non-contentious business to any party of an intended application for a grant which he may have an interest in opposing, as well as the mode of giving notice, under Order XVI. r. 17, in pending actions, to parties interested in questions raised in such actions, for the purpose of binding them by the judgment of the Court.

Affidavit to lead citation.

Before the citation issues from the registry an affidavit to lead it must be filed, which should verify the facts upon which it issues, and which facts should be recited in the citation.

“ Citations can only be extracted from the principal

“ registry, and no citation is to issue under seal until an affidavit in verification of the averments it contains has been filed in the registry.” R. 68, N. C.

The affidavit should be made by the party, or one of the parties, on whose behalf it is extracted. A citation can only issue with the leave of one of the registrars. If the registrar entertains any doubts as to the propriety of allowing it to issue, or if he refuses to allow it to issue, the applicant may apply to the Court on motion for directions that it shall issue.

Before a citation issues a præcipe must be deposited in the registry, and then the registrar will sign and seal the citation.

Form of Præcipe for Citation.

Præcipe for
citation.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate).

“ Citation for A. B. against C. D. in a matter of
“ calling C. D., E. F. and G. H., to accept or refuse letters
“ of administration of the personal estate and effects of
“ I. K., late of , in the county of , who died on
“ the day of , at .

“ (Signed) G. H., solicitor for A. B.

“ [*Add an address within three miles of
the General Post-office.*]

“ The day of 18 .”

“ Before any citation is signed by the registrar, a caveat
“ shall be entered against any grant being made in respect
“ of the estate and effects of the deceased to which such
“ citation relates, and notice thereof shall be sent to the dis-
“ trict registrar of any district in which the deceased appears
“ to have resided at the time of his death.” R. 66, N. C.

Entry of
caveat.

“ Such caveat to be renewed from time to time, so as to
“ be kept in force so long as the proceeding arising from
“ the service of the citation are pending.” R. 15.

“ Every citation shall be written or printed on parchment, and the party extracting the same, or his solicitor, shall take it, together with a præcipe, to the registry, and there deposit the præcipe and get the citation signed and sealed. The address given in the præcipe must be within three miles of the General Post-office.” R. 17.

Form of Citation.

“ Citation to accept or refuse Letters of Administration.
 “ In the High Court of Justice,
 “ Probate, Divorce and Admiralty Division.
 “ (Probate.)

“ Victoria, by the grace of God of the United Kingdom
 “ of Great Britain and Ireland Queen, Defender
 “ of the Faith: To C. D., E. F. and G. H., of
 “ of , &c.

“ Whereas it appears by an affidavit of A. B., of
 “ sworn on the day of and filed in the probate
 “ or principal registry of the Probate, Divorce and Admiralty Division of our High Court of Justice, that I. K.,
 “ late of died on the day of 18 , at
 “ , a bachelor and intestate, without parent, leaving
 “ C. D., his natural and lawful brother and sole next of
 “ kin, and E. F. and G. H., his natural and lawful nephew
 “ and niece, together with the said C. D., the only parties
 “ entitled in distribution to his personal estate and effects
 “ in case he died intestate. And whereas it further appears
 “ by the said affidavit that the said A. B. is a creditor of
 “ the said deceased : Now this is to command you the said
 “ C. D., E. F. and G. H., that within eight days after the
 “ service hereof on you, inclusive of the day of such service,
 “ you do cause an appearance to be entered for you respectively in the probate or principal registry of the said
 “ division, and accept or refuse the letters of administration
 “ of all and singular the personal estate and effects of the
 “ said deceased, or show cause why the same should not be

“ granted by authority of our said Court to the said A. B.,
 “ a creditor of the said deceased. And take notice, that in
 “ default of your so appearing and accepting and extract-
 “ ing the said letters of administration, the president or
 “ judge of the Probate, Divorce and Admiralty Division
 “ of our High Court of Justice, or the registrars of the
 “ probate or principal registry of the said division, will
 “ proceed to grant letters of administration of all and
 “ singular the personal estate and effects of the said
 “ deceased to the said A. B. your absence notwithstanding.
 “ Dated this day of 18 , and in the
 “ year of our reign.

“ Citation.

“ L. M.,	(L.S.)	“ H. A. B.,
“ Chancery Lane.		“ Registrar.”

The service of a citation, whenever practicable, should be personal. Service of citation.

“ Citations are to be served personally when that can be
 “ done, the party cited being resident in Great Britain or
 “ Ireland.” R. 18.

“ Personal service shall be effected by leaving a true Mode of per-
sonal service.
 “ copy of the citation with the party cited, and showing
 “ such party the original, if required by him so to do.”
 R. 18.

“ Where the party to be cited is resident in Great When per-
sonal service
cannot be
effected.
 “ Britain or Ireland, and personal service cannot be
 “ effected, the direction of the judge or registrars as to
 “ the mode of service must be obtained.” R. 18.

“ Citations may be served upon parties resident out of Substitutional
service, where
party resident
out of Great
Britain and
Ireland.
 “ Great Britain or Ireland by the insertion of the same or
 “ of an abstract thereof, settled and signed by one of the
 “ registrars, as an advertisement, in such of the morning
 “ and evening London newspapers, and if necessary in
 “ such local newspapers and at such intervals as the judge
 “ or a registrar may direct: provided that in any case the
 “ judge or a registrar may direct a citation to be served

Service on agent in England (if any) of party cited. “ personally. If the party cited be abroad, having an agent resident in England, such agent must be served with a true copy of the citation.” R. 19.

Abstract of Citation.

“ In the High Court of Justice,
 “ Probate, Divorce and Admiralty Division.
 “ (Probate.) “ The Principal Registry.
 “ To A. B., of widow.

Abstract of citation.

“ Take notice, that a citation has issued under seal of her Majesty’s High Court of Justice, dated the day of 18 , whereby you A. B. are cited to appear within thirty days after the publication of this notice, and accept or refuse letters of administration of the personal estate and effects of C. B., late of , late your husband, deceased, or show cause why the same should not be granted to D. B., the natural and lawful sister and one of the next of kin of the said deceased, with an intimation that in default of your appearance the said letters of administration will be granted to the said D. B.

“ Registrar.

“ I. K.,
 “ Of , solicitor.”

Service on a *feme covert*.

Where the person to be served is a *feme covert*, service of the citation should, if practicable, be effected upon her in the presence of her husband.

Service on minors.

Service upon minors should be effected upon the minor in the presence of his natural or legal guardian, or at least of that of some person or persons upon whom the actual care and custody of the minor for the time being has properly devolved. *Cooper v. Green*, 2 Add. 454; *Brown v. Wildman*, 28 L. J. 54; for exception, see *Lainson v. Naylor*, 2 S. & T. 7; 29 L. J. 126.

Where the citation was served upon two minors at the house where they resided, and both their custodian and

next-of-kin evaded service, the service on the minors was held to be sufficient. *Lean v. Viner and Another*, 3 S. & T. 469; 33 L. J. 88.

Where the person to be served is a lunatic, and a committee of his estate has been appointed, service upon the committee as well as upon the lunatic is required. When there is no committee, the service, according to the practice of the Prerogative Court, should be effected upon the lunatic in the presence of a medical man. *In the goods of Anna Hepburn Surtees*, 28 L. J. 89.

Service upon lunatics.

When the citation has been served, it should be returned to the registry, with a certificate of service indorsed upon it (*Goodburn v. Bainbridge*, 2 S. & T. 4; 29 L. J. 163); and where the party served is a *feme covert*, a minor, or a lunatic, the certificate should show that there has been special service thereof. An affidavit of service should at the same time be filed in the registry; the citation served should be made an exhibit to it, so as to identify it. *Haranc v. Dawson and Clucas*, 3 S. & T. 50; 32 L. J. 94. And when a party cited by advertisement has no agent in this country, the affidavit should state that he has no attorney, agent, or correspondent in this country. *Kenworthy v. Kenworthy and Watson*, 3 S. & T. 64; 32 L. J. 107.

Indorsement of service.

“Affidavit of Service of Citation.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between A. B. Plaintiff,

“ and

“ C. D. Defendant.

“ In the goods of G. H., deceased.

“ I, E. F., of , make oath and say as follows:—

Affidavit of service of citation.

“ I. I did on the day of , duly serve the

“ above-named C. D. with a true copy of a citation issued

“ out of this Honorable Court in the above-named suit,

“ and now hereunto annexed marked A, by delivering to
 “ and leaving the same with him at , and at the
 “ same time, at his desire and request, I showed him the
 “ original thereof.

“ Sworn at
 “ this day of , } “ (Signed) E. F.”
 “ 18 , before me, .

Of appear-
 ances.

“ The party cited should, within the time named in the
 “ citation, enter an appearance in the principal registry in
 “ a book provided for the purpose, and kept by the clerk
 “ of the papers. The entry must set forth the interest
 “ which the person on whose behalf it is entered has in the
 “ estate and effects of the deceased.” R. 26.

“ The entry and the appearance of a party shall be
 “ accompanied by an address within three miles of the
 “ General Post Office.” R. 27.

For form of entering appearance and regulations re-
 lating thereto, see *ante*, pp. 51, 52.

If no appearance is entered, an affidavit in the following
 form of search and non-appearance should be filed with
 the case for motion :—

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between A. B. Plaintiff,

“ and

“ C. D., E. F. and G. H. Defendants.

“ In the goods of E. F., deceased.

“ S. T., clerk to O. P., of , solicitor for the above-
 “ named plaintiff, make oath and say as follows :—

“ 1. On the day of , 18 , the said O. P.
 extracted a citation in the above-named suit.

“ 2. On the day of 18 , I duly and care-
 “ fully searched the book kept in the principal registry
 “ of this Honorable Court for the entry of appearances

Affidavit of
 search and
 non-appear-
 ance to cita-
 tion.

“in matters and suits from the said day of ,
 “ 18 , to the present day (the day of in-
 “ stant), to ascertain whether or not any appearance to the
 “ said citation had been entered either by or on behalf of
 “ the above-named defendants, or by or on behalf of any
 “ or either of them.

“ 3. No appearance to the said citation has been entered
 “ either by or on behalf of the above-named defendants,
 “ or by or on behalf of any or either of them.

“ Sworn at
 “ this day of , } “ (Signed) G. H.”
 “ 18 , before me, . }

“ No grants are to issue from a district registry after a
 “ citation without the production of an office copy of the
 “ decree or order of the judge, or of one of the registrars
 “ of the principal registry authorizing the same.” R. 80,
 D. R.

CHAPTER IV.

SUMMONSES—FOUNDATION OF JURISDICTION TO PROCEED BY SUMMONS IN NON-CONTENTIOUS BUSINESS—ENTRY OF AN APPEARANCE IN THE MATTER—ORDER FOR AN INVENTORY—ORDER FOR ASSIGNMENT OF ADMINISTRATION BOND—CASES FOR WHICH AN ORDER FOR ASSIGNMENT OF BOND MAY ISSUE—GROUNDS FOR RESISTING ORDER FOR ASSIGNMENT OF BOND—A SOLICITOR LIABLE TO SUMMONS—RULES AS TO SUMMONSES.

“A summons may be taken out by any person in non-contentious business in which there is no rule or practice requiring a different mode of proceeding.” R. 98.

A summons calls upon the opposite party to appear on a certain day, and at a certain hour specified, at the judges' chambers, to show cause why he should not do a certain act, or why the party summoning should not be permitted to do a certain act, for example, why the party summoned, being an executor, should not within a fortnight, bring in an inventory and account of the testator's estate.

In contentious business a party to an action may be brought before the judge on summons in all questions arising in the action, which by the rules are cognizable by the judge sitting in chambers.

Foundation of jurisdiction to issue a summons in a non-contentious matter.

In non-contentious business a party who has an interest in the matter is to be brought before the Court by citation, unless he has done some act equivalent to an admission, that the Court has cognizance of the matter in question.

Thus a party, who has entered an appearance to a caveat or a citation, or who of his own mere motion has entered an appearance in the matter, by reason of his appearance is liable to a proceeding by summons.

Order for an inventory.

So also an executor or an administrator by reason of the terms of his oath to lead the grant by which he swears “that he will exhibit a true and perfect inventory of all

“ and singular the estate and effects of the deceased, and
 “ render a just and true account thereof, whenever required
 “ by law so to do,” is by the present practice ordered on
 summons to bring in an inventory and account. [For
 Form of Inventory, see post, App. Forms, Cont. Bus. 1862,
 No. 27.]

So also the surety to an administration bond by reason
 of his being surety to a bond given to the judge of the
 Court to secure the due administration of the estate of the
 deceased, is by the present practice liable to be called on
 summons to show cause why, on the judge being satisfied
 that the condition of such bond has been broken, an order
 should not be made on one of the registrars to assign the
 same to some person to be named in the order, to entitle
 such person, his executors or administrators, to recover by
 action on the bond, as trustee for all persons interested,
 the amount recoverable in respect of any breach of the con-
 dition of the bond. See sect. 83 of The Court of Probate
 Act, 1857, and sect. 15 of The Court of Probate Act, 1858.

Order to
 assign admin-
 istration
 bond.

“ The Court may, on application made on motion or
 “ petition in a summary way, and on being satisfied that
 “ the condition of any such bond has been broken, order
 “ one of the registrars of the Court to assign the same to
 “ some person, to be named in such order, and such person,
 “ his executors or administrators, shall thereupon be en-
 “ titled to sue on the said bond, in his own name, both at
 “ law and in equity, as if the same had been originally
 “ given to him instead of to the judge of the Court, and
 “ shall be entitled to recover thereon as trustee for all
 “ persons interested the full amount recoverable in respect
 “ of any breach of the condition of the said bond.” The
 Court of Probate Act, 1857, sect. 83.

The Court of
 Probate Act,
 1857, s. 83.

Power of
 Court to
 assign bond.

“ Bonds given to any archbishop, bishop or other person
 “ exercising testamentary jurisdiction in respect of grants of
 “ letters of administration made prior to the eleventh day
 “ of January, one thousand eight hundred and fifty-eight,
 “ or in respect of grants made in pursuance of ‘The Court

Court of
 Probate Act,
 1858, s. 15.
 Bonds given
 before Jan.
 11th, 1858, to
 remain in
 force.

“ ‘ of Probate Act,’ or of this Act, whether taken under a
 “ commission or requisition executed before or after the
 “ said eleventh day of January, shall enure to the benefit
 “ of the judge of the Court of Probate, and if necessary
 “ shall be put in force in the same manner and subject to
 “ the same rules (so far as the same may be applicable to
 “ them) as if they had been given to the judge of the said
 “ Court subsequently to that day.” Court of Probate Act,
 1858, sect. 15.

Case to be
 proved by ap-
 plicant for
 order to assign
 bond.

The applicant for the order should by affidavit make out a *prima facie* case that there has been a breach of the condition of the bond. See *Young v. Oxley*, 1 S. & T. 25; 27 L. J. 30, where a bond given in the Consistory Court of Chester was ordered to be assigned. See also *Sandrey v. Mitchell and another*, 3 S. & T. 25; S. C., 32 L. J., Q. B. 100; *Re W. Jones*, 3 S. & T. 28; 32 L. J. 26; *Baker and Marshman v. Brooks*, 3 S. & T. 32; 32 L. J. 25; *Re Young*, 1 L. R. 186; 35 L. J. 126.

Grounds for
 resisting order
 to assign
 bond.

The surety or his personal representative may resist the order by showing on affidavit that there has in fact been no breach of the condition of the bond. Thus *In re Coates*, January, 1879 (not reported), the M. R. having made an order in an administration action for an application to be made to the Probate Division for an order to assign the bond for a breach of the condition, by reason of a devastavit by the administratrix, on one of the sureties showing by affidavit that assets up to the amount of the sum, under which the estate had been sworn and in respect of which amount the bond had been given, had been duly administered, and that the devastavit related to assets in excess of the amount for which the bond was given, the summons was by consent dismissed with costs, and the order of the M. R. was rescinded.

So also a surety, or his representatives, may show that there has been a release or waiver of the breach of the condition on the part of the applicant, or on the part of those under whom he claims. Thus it was held, in *Newton v.*

Sherry and others, 1 C. P. Div. 246, that where a notice had been advertised, under sect. 29 of 22 & 23 Vict. c. 35, by the executor of the principal to an administration bond, addressed "to creditors and other persons having claims or demands against or upon the estate of the intestate, requiring them to send in particulars of their claims or demands upon the estate to the administrator, or that in default thereof he would, at the expiration of the time mentioned in the notice, proceed to administer the assets of the deceased, having regard only to the claims and demands of which he should then have had notice," such notice was a sufficient notice, under the statute, to protect the sureties to the bond from liability for the acts of the administratrix.

A solicitor, as an officer of the Court, is liable to a proceeding by summons for any act done by him, *quâ* solicitor, in respect of any matter within the jurisdiction of the Probate Division in non-contentious business.

A solicitor *quâ* officer of Court liable to summons.

The following rules as to summonses are all in force in non-contentious business, and some of them in contentious business:—

"A summons may be taken out by any person in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding." R. 98.

Rules as to summonses.

"A printed form must be obtained and filled up with the object of the summons, and a proper fee stamp affixed. It must then be taken to the clerk of the papers, who will insert in the blank left in the printed form the time when the summons is to be made returnable, and get the summons signed by a registrar." R. 99.

"The clerk of the papers is then to enter the name of the cause or matter, and of the agent taking out the summons, in the summons-book, and return the summons (with the stamp cancelled) signed to the applicant, who is to serve a copy on the party summoned. This copy must be served on the party summoned one clear day at

“least before the summons is returnable, and before 7 P.M.
“On Saturdays the copy of the summons is to be served
“before 2 P.M.” R. 100.

“On the day and at the hour named in the summons,
“the party issuing the same is to present himself with the
“original at the judge’s chambers.” R. 101.

“Both parties will be heard by the judge, who will make
“such order as he may think fit, and a note of such order
“will be made by the registrar in the summons-book.”
R. 102.

“If the party summoned do not appear after the lapse
“of half an hour from the time named in the summons,
“the party taking out the summons shall be at liberty to
“go before the judge, who will thereupon make such
“order as he may think fit.” R. 103.

“An attendance on behalf of the party summoned for
“the space of half an hour, if the party taking out the
“summons do not during such time appear, will be deemed
“sufficient, and bar the party taking out the summons
“from the right to go before the judge on that occasion.”
R. 104.

“If a formal order is desired, the same may be had on
“the application of either party, and for that purpose the
“original summons, or the copy served on the opposite
“party, must be filed in the registry. An order will
“thereupon be drawn up, and delivered to the person
“filing such summons or copy. The clerk of the papers,
“before giving out the order, is to see that the proper
“stamp has been affixed to it, and is to cancel such stamp.”
R. 105.

“If a summons is brought to the clerk of the papers
“with a consent to an order indorsed thereon, signed
“by the party summoned, or by his proctor, solicitor or
“attorney, an order will be drawn up without the necessity
“of going before the judge: provided that the order
“sought is in the opinion of the registrars one which,
“under the circumstances, would be made by the judge.”
R. 106.

CONTENTIOUS BUSINESS.

CHAPTER V.

FUNCTIONS OF COURT—EXCLUSIVE JURISDICTION—CONCURRENT JURISDICTION UNDER COURT OF PROBATE ACT—CONCURRENT JURISDICTION UNDER JUDICATURE ACT—PROBATE—EFFECT OF PROBATE OR LETTERS OF ADMINISTRATION IN OTHER COURTS—REQUIREMENTS FOR OBTAINING PROBATE IN COMMON AND IN SOLEMN FORM—DIFFERENCE IN OPERATION OF PROBATE IN COMMON AND SOLEMN FORM—EFFECT OF COMPROMISE ON THIRD PARTIES—SOURCES OF PRACTICE—DIFFERENT KINDS OF ACTIONS—PARTIES ENTITLED TO PROPOUND WILL OR INTEREST—PARTIES ENTITLED TO OPPOSE A GRANT OF PROBATE OR ADMINISTRATION.

THE Probate Division, as has been already stated, has exclusive jurisdiction in relation to the granting of probates of wills affecting personal estate, and to the granting of letters of administration of the personal estates of intestates. Its function is to determine what testamentary papers are entitled in whole or in part to probate, and who is entitled to be constituted the personal representative of the deceased. When the deceased has died testate, it decides which of his testamentary papers constitute his last will, whether he has appointed an executor, and who that executor is. When he has died intestate, or when he has died testate, but has either appointed an executor who has declined to act, or has omitted to appoint an executor, it determines who is to administer to his personal estate. The decision of the Court as to the title to administration in the case of the deceased having died wholly intestate, or intestate as to his residuary estate, is regulated by statute—31 Edw. 3, st. 1, c. 11, and 21 Hen. 8, c. 5,—and by the practice of the Court. In the case of his having died

Functions of the Probate Court.

The Court has exclusive jurisdiction in granting probate and administration.

Decision of Court as to title to administration, how regulated.

testate as to his residuary estate, but without having appointed an executor, or having appointed an executor who is unable or unwilling to act, it is regulated by the practice of the Court.

Decision of Probate Court as to title to probate and to administration, how far and when conclusive.

But its decisions, either on the title to probate or on the title to administration is conclusive in all Courts in England, and where the decision turns upon any particular question, such decision is conclusive upon that question as between the same parties. Thus, if the sentence in an action for a grant of letters of administration turns upon the question, which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in an action for distribution between the same parties. *Barry v. Jackson*, 1 Phill. C. C. 582; *Bourehier v. Taylor*, 4 Bro. C. C. C. 708. So, also, where there is a question whether legacies are cumulative or substantive, and it is determinable by the circumstance of the bequests having been given by distinct instruments, and probate has issued of "a will and codicil," the form of the probate is conclusive of the fact of their being distinct instruments, though written on the same paper. *Baillie v. Butterfield*, 1 Cox, 192.

Deceased must have left personal property in England to give Court jurisdiction to grant probate or administration.

To give the Court jurisdiction to grant probate or letters of administration, the deceased must have left personal estate situate in England, upon which the grant may operate. Where, therefore, a deceased has left no personal property in England, the Court is without jurisdiction to make a grant.

Non-contentious business.

Where there is no contest as to the title to probate or to administration, the business relating to the issuing of the grant comes within that class of business termed in the language of the Probate Court, non-contentious or common form business, and is transacted in the principal registry or in one of the district registries, except in those cases in which, by the practice of the Court or from the circumstances of the case, the grant is preceded by a decree of the Court on motion.

Where there is a contest as to the title to probate or to administration, and any party claiming a grant commences an action for the purpose of establishing his right to it, the business becomes contentious, and all proceedings or steps in the action from its commencement to its termination come within what is termed in probate language the contentious business of the Court.

Contentious
business.

By Order LXIII. "the words 'probate actions' when used in the Rules, include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business."

The Probate Division has, by the Court of Probate Act, 1857, sects. 61—64, concurrent jurisdiction with the other divisions of the High Court in deciding on the validity of a will disposing of real estate, provided such will contains a disposition of personal estate, and some one interested in the personal estate is prosecuting an action for the purpose of obtaining a decree either in favour of, or adverse to, its validity. If the action proceeds to sentence, the decree will be so far binding on the realty, as to preclude persons who have been made, or who have become parties to the action from afterwards impeaching its validity.

The Court has concurrent jurisdiction as to devises of real estate in certain events.

The Probate Division has further concurrent jurisdiction with the other divisions under the Judicature Act, 1873, sect. 24, sub-sects. (6) and (7). The words of these sub-sections are as follows:—

The Court has now by the Judicature Acts further concurrent jurisdiction.

(6) "Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations and liabilities existing by the common law, or by any custom, or created by any statute, in the same manner as the same would have been recognized and given effect to if this Act had not passed by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice."

Judicature Act, 1873, s. 24, sub-s. (6) and (7).

(7) “ The High Court of Justice and the Court of Appeal
 “ respectively, in the exercise of the jurisdiction vested in
 “ them by this Act in every cause or matter pending before
 “ them respectively, shall have power to grant, and shall
 “ grant, either absolutely or on such reasonable terms and
 “ conditions as to them shall seem just, all such remedies
 “ whatsoever as any of the parties thereto may appear to
 “ be entitled to in respect of any and every legal or equit-
 “ able claim properly brought forward by them respectively
 “ in such cause or matter; so that, as far as possible, all
 “ matters so in controversy between the said parties respec-
 “ tively may be completely and finally determined, and all
 “ multiplicity of legal proceedings concerning any of such
 “ matters avoided.”

Conditions of
 exercise of
 further juris-
 diction.

To enable the Court to exercise jurisdiction under these sub-sections, the question must fairly arise out of the suit for probate or administration,—the issue involved in the decision must be fairly raised on the pleadings,—all the parties whose interest can be affected by the decision must be before the Court, and the Court should be of opinion that the question it is asked to determine is ready to be and can be conveniently and properly decided between the parties to the pending action. *In the goods of Tharp*, 3 P. Div., pp. 82, 83, 88.

Where, therefore, probate was claimed of the will of a married woman on the ground that she had separate property, and that the will disposed of such property, and the claim to probate was resisted on the part of the husband, on the ground that she had no separate property, and the Court was satisfied that the deceased left separate property, which passed under the will, it was held on appeal to be the duty of the Court not only to grant probate of the will limited to such effects as the deceased had power to dispose of, and had disposed of accordingly, but to decide judicially, so far as the evidence and pleadings would enable it, of what such property consisted, and to add to the decree a declaration in accordance with the finding. *In the goods of Tharp*, 3 P. Div. 76.

So, also, the Probate Court has now power to decide on the sufficiency of the execution of a power by will, as well as on the validity of the will, purporting to execute the power. *In the goods of Tharp*, 3 P. Div. 82.

So, also, where a will was propounded by the plaintiffs, who took half the residue under it, the defendants and interveners taking the other half, and it appeared in the evidence, that subsequently to its execution the deceased had been anxious to make another will giving the whole of the residue to the defendants, but had been forcibly prevented by the plaintiffs from making it, the Court allowed the defendants to amend their statement of claim by adding a claim that the Court will declare that the plaintiffs held the property given to them by the will in trust for the defendants. *Betts and another v. Doughty and others*, 5 P. Div. 26; 48 L. J. 71.

Probate of wills may be granted either in common form or in solemn form of law.

A probate is an instrument in writing under the seal of the Court, and signed by one of the registrars or district registrars certifying that the last will and testament thereunto annexed of the testator named therein has been “proved” and registered in a registry of the Probate Division, and that administration of the testator’s personal estate has been granted to the executor named in the will, he having first sworn faithfully to administer the same and to exhibit an inventory and to render a true account thereof whenever required by law so to do. To the probate is annexed a transcript or *verbatim* copy of the contents of the will proved, engrossed on parchment, with a note of the amount under which the personal estate has been sworn.

What is a probate.

The probate upon its production is accepted in all Courts in England as conclusive evidence of the executor’s title, and of the validity and contents of the will.

In like manner letters of administration upon their production are accepted in all Courts in England as conclusive

Effect of probate or letters of administration in other Courts.

evidence of the title of the administrator to be the personal representative of the deceased in England.

How probate
in common
form obtained.

Probate in common form issues from the principal or from one of the district registries on the *ex parte* application of the executor or other party applying for the grant, upon an affidavit made by the applicant to lead the grant accompanied with an affidavit for the Commissioners of Inland Revenue.

Probate in solemn form of law is preceded by an action and a sentence of the Probate Division pronouncing for the validity of so much of the will as appears on the face of the probate.

The requirements for obtaining a decree of probate in solemn form in an uncontested action are as follows:—

Requirements
for obtaining
probate in
solemn form
in an uncon-
tested action.

1. The executor of the will to be proved, or, failing him, a residuary or other legatee, or a party interested under the will, should serve the next of kin and other parties entitled in distribution to the personal effects of the deceased in case he should have died intestate, with a writ of summons, or where a caveat has been entered and warned, and an appearance has been entered to such warning, the party who has appeared to such warning.

When the deceased was a bastard or has died without any known relation, the Queen's proctor should be made a defendant and served with a writ of summons, unless the deceased at the time of his death had a fixed residence within the Duchies of Lancaster or of Cornwall, in which case the proctor for the Duchy should be made a defendant and be served with the writ.

2. The executor, or residuary or other legatee, or party interested under the will should propound the will in a statement of claim, and set the action down for and proceed to a hearing.

3. The Court should be satisfied, upon the examination of one or more witnesses, of the due execution of the will, and of the testamentary capacity of the testator at the time of its execution. To prove the due execution of a will it

is necessary to examine one only of the attesting witnesses, provided he deposes to its due execution. *Belbin v. Skeats*, 1 S. & T. 148; 27 L. J. 56. If the witness called fails to prove its due execution, then the party propounding the will is bound to call the other attesting witness, notwithstanding his being an adverse or a hostile witness. *Owens v. Williams*, 4 S. & T. 202; 32 L. J. 159; *Coles v. Coles and Brown*, 1 L. R. 70; 35 L. J. 40. If the Court is dissatisfied with the evidence of the attesting witness examined, it is competent to it to decline to grant probate of the instrument propounded in the absence of the evidence of the other attesting witness.

The difference in effect between a probate which has been granted in common form, and a probate which has been granted in solemn form, is that the former is revocable and the latter, provided proper precautions have been taken, is, subject to one exception, irrevocable.

Any party whose interest is adversely affected by a probate granted in common form may, without limitation as to time (for the Statute of Limitations, 3 & 4 Will. 4, c. 27, does not apply to the case of probates or letters of administrations, in so far as they relate to personal estate), call it in, and put the party who obtained it, or his representative, upon proof of the will in solemn form. *Hoffman v. Norris*, 2 Phill. 231; *Merryweather v. Turner*, 3 Curt. 802, 817; *In goods of Topping*, 2 Roberts. 620.

A probate or administration issued not in pursuance of a judgment of the Court, until revoked, will, by the Court of Probate Act, 1857, have the following operation:—

“Where any probate or administration is revoked under this Act, all payments *bonâ fide* made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which

Difference between probate in common form and probate in solemn form.

Effect of probate in common form.

The Court of Probate Act, 1857, s. 77.

Payments under revoked probates or administration to be valid.

“ the person to whom probate or administration shall
 “ be afterwards granted might have lawfully made.”
 Sect. 77.

Sect. 78.

Persons, &c.
 making pay-
 ments upon
 probates
 granted for
 estate of
 deceased per-
 son to be
 indemnified.

“ All persons and corporations making or permitting to
 “ be made any payment or transfer *bonâ fide*, upon any
 “ probate or letters of administration granted in respect of
 “ the estate of any deceased person under the authority of
 “ this Act, shall be indemnified and protected in so doing,
 “ notwithstanding any defect or circumstance whatsoever
 “ affecting the validity of such probate or letters of ad-
 “ ministration.” Sect. 78.

Effect of
 probate in
 solemn form
 of law.

Probate in solemn form is irrevocable, where all the parties adversely affected by it have been parties or have been privies to the action in which it was decreed, and the judgment in that action has not been obtained by compromise, unsanctioned by the parties adversely affected, unless the existence of a will of later date is discovered subsequently to the date of the decree. The decree will preclude all persons who have been parties or privies to the action from afterwards impeaching its validity. But should the probate be subsequently called in by a person adversely affected by it, who was not a party or privy to the action or to the compromise (if any), and be revoked, such revocation will enure to the benefit of parties and privies to the first action, and who were adversely affected by the revoked probate.

The effects of
 a compromise
 of a suit on
 privies to suit.

What will be the effect of a compromise on a privy to a suit was fully discussed and considered in *Wytcherley v. Andrews* (2 L. R. 327; 40 L. J. 57), and the rule to be extracted from the judgment delivered in that case as applicable to compromises of actions may thus be stated: It is not necessary in the Probate Court that a person should be a party to a suit, in order that he should be bound by its result; it is sufficient that he be privy to the proceeding. If a person is privy to a suit, and, knowing what is passing, is content to stand by and see his battle fought by somebody else in the same interest, and it appears that everything has been

done *bonâ fide* in his interest, he is bound by the result, and is not allowed to re-open the case. But if the suit terminates in a compromise, entered into without notice to him, and without his having knowledge that the suit is not proceeding to its natural end, he is not bound by the agreement which the parties to the suit choose to enter into. A bargain only binds those by whom it is made. Persons who are willing to stand by while a contest is going on are bound by the decision of the Court, but they are not compelled to abide by a compromise, when no decision is, in fact, come to by the Court.

Upon the discovery, after the decree, of the existence of a will of a date subsequent to the date of the will proved in solemn form, the probate, although decreed in solemn form, is liable to be re-called and revoked in favour of the later will.

A decree of probate in solemn form where the will disposes of real as well as of personal estate, and all parties interested in the real estate have become or been made parties to the suit, enures for the benefit of all parties interested in the real estate in the same manner as it does for parties interested in the personal estate. Sect. 62 of the Court of Probate Act, 1857 :—

“ Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of her Majesty’s Court of Probate, shall in all Courts and in all suits and proceedings affecting real estate, of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like

Effect of discovery of a later will.

The Court of Probate Act, 1857, s. 62.

Where the will is proved in solemn form, or its validity otherwise decided on, the decree of the Court to be binding on the persons interested in the real estate.

“ manner as a probate is received in evidence in matters relating to the personal estate ; and where probate is refused or revoked, on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders.”

The proceeding necessary for obtaining a judgment or final decree of the Court, in relation to the granting of probates or administrations, which was termed in the Prerogative Court a cause, and in the Court of Probate a cause or suit, is in the High Court termed an action.

Actions.

“ All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.” Order I. rule 1.

Other proceedings.

“ All other proceedings in and applications to the High Court may, subject to these rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Act had not been passed.” Order I. rule 3.

Sources of practice of Probate Division in contentious business.

The practice of the Probate Division in contentious business is regulated by the Judicature Act, 1875, and by the rules of procedure and practice established under that Act ; and where no other provision is made by that Act, or by the rules made under it, the practice is regulated

by what was the procedure and practice of the Court of Probate.

See the following note, which is prefixed to the first schedule to the Judicature Act, 1875. [“ Note.—Where no “ other provision is made by the Act or these Rules, the “ present procedure and practice remain in force.”]

The practice of the Court of Probate was regulated by what was the practice of the Prerogative Court of Canterbury, as altered by the Court of Probate Act, 1857, and by the rules and orders made under that Act, and by the Court of Probate Act, 1858.

Sources of the practice of the Court of Probate in contentious business.

See sect. 29 of the Court of Probate Act, 1857, “ The “ practice of the Court shall, except where otherwise provided by this Act, or by the rules or orders to be from “ time to time made under this Act, be, so far as the “ circumstances of the case will admit, according to the “ present practice in the Prerogative Court.”

The foundation of every action in the Probate Division, must be either a claim to a title to probate or to letters of administration.

Foundation of all actions in Probate Division.

The forms of actions in the Probate Division are three in number—(1) actions for proving wills in solemn form of law or probate actions; (2) administration actions; (3) actions for the revocation of probates or letters of administration.

Different forms of action in Probate Division.

1. In actions for proving wills in solemn form the question—the main and generally the sole question,—for the determination of the Court is, whether a will or other testamentary paper is or is not, in whole, or in part, valid as a testamentary instrument.

Actions for proving wills in solemn form of law.

If the instrument or part of it is found to be valid, it is entitled to be admitted in whole or in part to probate, and the Court will pronounce for its validity, and will decree probate of it in whole or in part in solemn form of law. Upon this decree being pronounced, probate or administration, with the will annexed, will issue in the registry to

the executor or to a party entitled to administration upon his taking the usual oaths to lead the grant.

If the instrument is found to be invalid, it is not entitled to be admitted to probate, and the Court will pronounce against its validity, and a grant of probate of any other valid testamentary paper, or of administration as in an intestacy, will, according to the circumstances of the case, issue in the registry, on the party entitled thereto applying for the same, and taking the usual oaths.

Where parties whose interests are opposed to a will seek to have it pronounced against.

Generally the party propounding a will or other testamentary paper does so with the object of establishing its validity. But cases occur in practice, in which the parties interested in supporting a will, purposely refrain from so doing; and this, where it is essential in the interests of those who are opposed to the will, that it should be set aside by a decree of the Court.

Such a decree may be obtained by the party adverse to the will instituting an action for the purpose of establishing his right to represent the deceased, and claiming in such action a sentence against the will on the ground of its invalidity, and producing evidence sufficient to justify the Court in making the decree claimed.

Administration actions.

2. In administration actions, the question for decision is, which of two or more claimants are entitled to a grant of administration.

Questions involved in administration actions.

The decision of this question may involve an issue of pedigree or of legitimacy, and in either case the action is technically termed an interest suit.

Pedigree and legitimacy.
Fitness of applicant.

It may involve a question of the relative fitness of the respective claimants to administer to the deceased's estate, as where the contest is between a male and a female with equal interests—the preference *ceteris paribus* being for the male. *Cordeux v. Trasler*, 4 S. & T. 48; 37 L. J. 127. Where a next-of-kin is preferred to a widow who has eloped from her husband, or has cohabited with another man in his lifetime (*Fleming v. Pelham*, 3 Hagg.

217, n. (b); *Congers v. Kitson*, 3 Hagg. 556), or where she has lived separate from her husband (*Lambell v. Lambell*, 3 Hagg. 568; *Chappell v. Chappell*, 3 Curt. 429), or where the deceased, being a paper manufacturer and insolvent at the time of his death, the next-of-kin, who was a woman in low position of life, and quite unfitted to carry on or wind up the business, was passed over, and the grant made to the principal creditor, with the sanction of other creditors. *In the goods of Farrand*, 1 P. Div. 439.

The decision may involve the question, which of the claimants is preferred as administrator by the majority of interests. *Iredale v. Ford*, 1 S. & T. 305.

3. An action for the revocation of probate is instituted when probate has been granted of a will in common form, and it is desired to obtain an order for its revocation grounded on the alleged invalidity of the will, or on some material informality in the form of the probate. The object of such a suit is to compel the party who has obtained the probate to propound the will, and in the result the suit becomes an action for proving the will in solemn form of law.

An action for the revocation of letters of administration is instituted with a view to obtain an order for their revocation grounded on the allegation of their having been granted to a person without interest in the estate of the intestate. The object of such a suit is to compel the party who has obtained the grant of administration to establish such a degree of relationship with the deceased as will entitle him to the grant, and in the result it becomes an interest suit.

In an action either for the revocation of probate or for the revocation of letters of administration the party objecting to the probate or to the letters of administration must call in the probate or letters of administration by a citation, and should allege on the indorsement of his claim on the writ of summons, and in his statement of claim, as the

Majority of interests.

Actions for revocation of probate.

Actions for revocation of letters of administration.

Grants to be called in by citation.

ground for revoking the grant, the invalidity of the will, or the defendant's want of interest.

Parties to actions.

Parties to actions in the Probate Division are described as plaintiffs, defendants or interveners.

Plaintiffs.

By sect. 100 of the Judicature Act, 1873, the term "plaintiff" shall include every person asking any relief " (otherwise than by way of counter-claim as a defendant) " against any other person by any form of proceeding, " whether the same be taken by action, suit, petition, " motion, summons or otherwise ;" and the term " defendant " shall include every person served with any " writ of summons or process, or served with notice of, or " entitled to attend any proceedings."

Defendants.

Interveners.

An intervener is a party who, upon leave obtained on summons, has entered an appearance in a pending action for the purpose of protecting his interests in such action, and it is open to him to support the case either of the plaintiff, of the defendant, of another intervener, or to set up an independent case in his own behalf.

The foundation of title to be a party to a probate or administration action is interest—so that whenever it can be shown that it is competent to the Court to make a decree in a suit for probate or administration, or for the revocation of probate or of administration, which may affect the interest or possible interest of any person (*Kipping and Barton v. Ash*, 1 Roberts. 270 ; 4 N. Cas. 177 ; *Crispin v. Doglioni*, 2 S. & T. 17 ; 29 L. J. 130) ; such person has a right to be a party to such a suit in the character either of plaintiff, defendant or intervener. Consequently a party may be entitled to oppose all the testamentary papers of a deceased, and yet be disentitled to oppose *one* paper only, in which he has no interest (*Bascomb v. Harrison*, 2 Roberts. 118). Such was the rule in the Prerogative Court of Canterbury as to the foundation of title to be a party to a cause in that Court, and it was retained in the Court of Probate under the following rules:—

" Executors or other parties who, previously to the " passing of the Court of Probate Act, 1857, might prove

“wills in solemn form of law, shall be at liberty to prove
 “wills under similar circumstances, and with the same
 “privileges, liabilities and effect as heretofore.” R. 4.

“Next of kin and others who, previously to the passing
 “of the said Act, had a right to put executors or parties
 “entitled to administration with will annexed upon proof
 “of a will in solemn form of law, shall continue to possess
 “the same rights and privileges and be subject to the
 “same liabilities with respect to costs as heretofore.”
 R. 5.

“Parties who, previously to the passing of the said Act,
 “had a right to intervene in a cause may do so, with
 “leave of the judge or one of the registrars, obtained by
 “order on summons, subject to the same limitations, and
 “the same rules with respect to costs as heretofore.”
 R. 6.

The rules made under the Judicature Act do not abridge
 the rights of the same persons to be parties to probate
 and administration actions.

“All persons may be joined as plaintiffs in whom the Ord. 16, r. 1.
 “right to any relief claimed is alleged to exist, whether
 “jointly, severally, or in the alternative. And judgment
 “may be given for such one or more of the plaintiffs as
 “may be found to be entitled to relief, for such relief as
 “he or they may be entitled to, without any amendment.
 “But the defendant, though unsuccessful, shall be entitled
 “to his costs occasioned by so joining any person or
 “persons who shall not be found entitled to relief, unless
 “the Court in disposing of the costs of the action shall
 “otherwise direct.” Order XVI. R. 1.

“All persons may be joined as defendants against Ord. 16, r. 3.
 “whom the right to any relief is alleged to exist, whether
 “jointly, severally, or in the alternative. And judgment
 “may be given against such one or more of the defendants
 “as may be found to be liable, according to their respective
 “liabilities, without any amendment.” Order XVI. R. 3.

“It shall not be necessary that every defendant to any Ord. 16, r. 4.

“action shall be interested as to all the relief thereby
 “prayed for, or as to every cause of action included
 “therein; but the Court or a judge may make such order
 “as may appear just to prevent any defendant from being
 “embarrassed or put to expense by being required to
 “attend any proceedings in such action in which he may
 “have no interest.” Order XVI. R. 4.

Persons who
 are entitled to
 propound a
 will for proof
 in solemn
 form.

The persons who are entitled to propound a will for proof in solemn form are the executors, or failing them, a residuary legatee, a legatee, or where the residue has been left wholly or partially undisposed of, any party interested under an intestacy in such undisposed residue, as all being more or less interested in obtaining probate of the will. It sometimes happens that parties interested under the last will take a larger interest under a prior will or in the event of a total intestacy. But if they are content to rely on the last will, though less favourable to them than a former one, their course is to take steps to establish its validity by sentence of the Court.

An executor or other party interested under a will may proceed to prove it in solemn form, either of his own mere motion, or in consequence of having been challenged to do so by a party whose interests are adverse to it.

Risks of
 omitting to
 prove in
 solemn form.

They should prove in solemn form for their own protection, wherever there may be doubts as to the validity of the will, or a possibility of future opposition to it. The omission to do so upon the testator's death may involve them in the loss of material evidence in support of the will occasioned by the removal of witnesses by death or otherwise, should they be called upon to establish it at a later period. It may also involve them in liabilities should the probate be revoked after the estate has been administered, as they would thereby become liable to account for legacies paid under the revoked probate, and their only protection would then be the chance of being recouped by the recipients of such supposed legacies.

Executor,

An executor or administrator with the will annexed

may be compelled to prove a will in solemn form after having proved it in common form. So also may an executor, who has intermeddled in the administration of the deceased's estate, *i.e.* done any act in relation to his effects showing an intention to accept the executorship, or any act which would make him liable as executor *de son tort*. 1 Williams on Executors, 5th ed. 244; *Jackson and Wallington v. Whitehead*, 3 Phill. 577. But not so a party entitled to administration with the will annexed, who has intermeddled with the estate. *In the goods of Fell*, 2 S. & T. 126.

If an executor is unwilling to accept the executorship he should renounce probate. If he is indisposed to be a party to a threatened action, but is not indisposed to take probate if the will is established, his course will be to take no notice of the writ of summons, and if the will is established to apply for probate in common form. For service upon him of a writ of summons to prove a will in solemn form has not the same effect as service upon him of a citation to take probate under 21 & 22 Vict. c. 95, s. 16, by which if an executor named in a will is cited to take probate and fails to appear to such citation his right to the executorship wholly ceases. *Bewsher v. Williams*, 3 S. & T. 62.

An executor upon being served with a writ of summons to prove a will has two other courses open to him. (1) To appear and pray time to consider whether he will propound the will or not. 1 Williams on Exors. 242. (2) To appear and propound the will himself.

When an executor fails to appear to such writ of summons, or refuses to propound the will, it remains for the party entitled to the residue or a legatee named in the will, or of either of the representatives to propound the will *loco executoris*.

The following parties may put an executor or other person interested under a will on proof of that will in solemn form.

when compellable to prove in solemn form.

Executor may refuse to propound will, and yet if it is established may claim probate of it.

Parties who may compel proof of will in solemn form.

Widow and other parties entitled in distribution.

1. The widow and next of kin of the deceased, and other persons entitled in distribution to his personal estate in the event of an intestacy. If the deceased has died domiciled in the Duchy of Lancaster, the solicitor for the Duchy of Lancaster; if in the Duchy of Cornwall, the solicitor for the Duchy of Cornwall; and if elsewhere in England, the Queen's Proctor.

A legatee in the will.

2. A legatee named in the will in question, if his legacy has been omitted in the probate, or his representative.

An executor or a legatee in any other will.

3. An executor or a legatee named in any other testamentary instrument of the deceased whose interest is adversely affected by the will in question or their representatives.

The above parties may put an executor or other person interested under a will on proof in solemn form, after as well as before probate has been taken in common form, but the two following are allowed to do so only before, and not after probate in common form has issued (*Dabbs v. Chisman*, 1 Phill. 159), namely:—

A creditor in possession of administration.

4. A creditor in possession of administration.

An appointee of the Court.

5. A person in possession of administration under the 73rd sect. of the Court of Probate Act, 1857, as appointee of the Court (*Menzies v. Pullbrook and Ker*, 2 Curt. 851), without having a beneficial interest in the estate of the deceased.

6. The heir-at-law, devisee, or other persons pretending an interest in real estate disposed of by a will relating to personal as well as to real estate, are to be permitted to intervene, or they are to be made defendants in a suit for proving such will in solemn form, or for revoking the probate thereof, unless the Court shall with reference to the circumstances of the property of the deceased otherwise think fit to direct that the cause may proceed without their being cited. Sects. 61 and 63 of the Court of Probate Act, 1857.

CHAPTER VI.

COMMENCEMENT OF ACTION—WRIT OF SUMMONS—ACTIONS FOR REVOCATION OF PROBATE OR ADMINISTRATION—CITATION TO BRING IN GRANT—FORMS OF CITATION—WRITS OF SUMMONS—INDORSEMENT OF CLAIM—OBSERVATIONS ON DEFENDANTS TO WRITS—INDORSEMENT OF CLAIM AND AFFIDAVIT VERIFYING INDORSEMENT—INDORSEMENT OF ADDRESS—ISSUE OF WRIT OF SUMMONS—CONCURRENT WRITS—DISCLOSURE OF SOLICITORS AND PLAINTIFFS—RENEWAL OF WRIT—SERVICE OF WRIT OF SUMMONS—SUBSTITUTED SERVICE—SERVICE OUT OF JURISDICTION—APPEARANCE—DEFAULT OF APPEARANCE.

THE subject next for consideration is the procedure in actions, which is regulated by various Orders appended to and forming part of the Judicature Act, 1875, or which have been since issued in pursuance of powers contained therein.

An action in the Probate Division, as in the other divisions of the High Court, is commenced by a writ of summons issued at the instance of the plaintiff against the defendant, which is to be indorsed with a statement of the nature of the plaintiff's claim against the defendant.

The issue of writs in all actions in the Probate Division is to be preceded by the filing in the central office of the High Court of an affidavit verifying the indorsement of claim.

“The issue of a writ of summons in probate actions shall be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs in verification of the indorsement on the writ.” Order V. R. 10.

The issue of a writ of summons in an action for the revocation of probate and of letters of administration must, by the practice, be either preceded by or be simultaneous with the issue of a citation against the party to whom the grant of probate or administration was made, requiring

Citation before or at time of issue.

Writs for revocation of probate or administration

to bring in
grant.

him to bring into and leave in the probate registry the grant, and to show cause why it should not be revoked.

There must be an affidavit filed to lead this citation in verification of the facts on which it is founded.

Citation to bring in Probate.

Form of
citation to
bring in
probate.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Victoria, by the grace of God of the United Kingdom

“ of Great Britain and Ireland Queen, Defender

“ of the Faith: To of in the county

“ of .

“ Whereas it appears by an affidavit of C. D., of

“ sworn on and filed in the probate or principal

“ registry of the Probate, Divorce and Admiralty Division

“ of our High Court of Justice, that probate of the

“ alleged last will and testament [with codicils thereto]

“ of A. B., late of , deceased, was on or about the

“ day of , 18 , granted to you by our

“ Court of Probate [*or at the probate district registry*

“ attached to the said division of our said High Court at

“]: and that the said deceased died a bachelor

“ without parent [*or as the case may be*], and that the said

“ C. D. is one of the natural and lawful brothers and next

“ of kin of the said deceased, and one of the persons en-

“ titled in distribution to his personal estate and effects in

“ case he shall be pronounced to have died intestate [*or*

“ interested under a former will bearing date, &c., *or as*

“ *the case may be*], and that the said probate ought to be

“ called in, revoked and declared null and void in law:

“ Now this is to command you, the said that within

“ eight days after service hereof on you, inclusive of the

“ day of such service, you do bring into and leave in the

“ probate or principal registry of the Probate, Divorce and

“ Admiralty Division of our High Court of Justice the

“ aforesaid probate, and further do show cause (if you
 “ should think it for your interest so to do) why the said
 “ probate should not be revoked and declared null and
 “ void in law, and the said will [and codicils] pronounced
 “ to be null and invalid.

“ Dated this day of 18 , and in the
 “ year of our reign.

“ (Signed) E. F., Registrar.

“ Citation to bring in probate.

“ [*Name of the solicitor.*]”

Indorsement to be made after Service.

“ This citation was served by G. H. on the within-
 “ named of , at on the day of
 “ , 18 .

“ (Signed) G. H.”

Form of Citation to bring in Administration.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

Form of
 citation to
 bring in
 letters of ad-
 ministration.

“ Victoria, by the grace of God of the United Kingdom

“ of Great Britain and Ireland Queen, Defender of

“ the Faith.

“ To of in the county of .

“ Whereas it appears by an affidavit of A. B. of

“ sworn on and filed in the probate or principal registry

“ of the Probate, Divorce and Admiralty Division of our

“ High Court of Justice, that C. D., late of

“ deceased, died on at and that on the letters

“ of administration of the personal estate and effects of

“ the said deceased, on the suggestion that he had died

“ intestate, were granted to you by the authority of our said

“ Court as the and next of kin of the said deceased,

“ and that it has since been discovered that the said C. D.

“ made and duly executed his last will and testament,

“ dated and thereof appointed executors [or

This affidavit
 must be made
 by the plain-
 tiffs or one of
 them.

“ other forms of writs, and of indorsements thereon, than writ and
 “ the forms hereinafter prescribed, shall be borne by the endorsement.
 “ party using the same, unless the Court shall otherwise
 “ direct.” Order II. R. 2.

Form of Writs of Summons.

“ 18 . [Here put the letter and number.]

“ In the High Court of Justice.

Form of writ.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between A. B. . . . Plaintiff,

“ and

“ C. D. and E. F. . . . Defendants.

“ Victoria, by the grace of God, &c.

“ To C. D. of . . . in the county of . . . and E. F.
 “ of . . .

“ We command you, that within eight days after the
 “ service of this writ on you, inclusive of the day of such
 “ service, you do cause an appearance to be entered for you
 “ in an action at the suit of A. B.; and take notice, that
 “ in default of your so doing the plaintiff may proceed
 “ therein, and judgment may be given in your absence.
 “ Witness, &c.”

Memorandum to be subscribed on the Writ.

“ N.B.—This writ is to be served within (twelve) calendar
 “ months from the date thereof, or, if renewed within six
 “ calendar months from the date of the last renewal, in-
 “ cluding the day of such date, and not afterwards.

“ The defendant [*or* defendants] may appear hereto by
 “ entering an appearance [*or* appearances] either personally
 “ or by solicitor at the Central Office, Royal Courts of
 “ Justice, London.

“ This writ was issued by . . . of . . . whose address for
 “ service is . . . agent for . . . of . . . solicitor for the said
 “ plaintiff, who resides at . . .

“ This writ was served by me at on the defendant
the day of .

“ Indorsed the day of .

“ Signed.

“ [*Address.*.]”

“ No writ of summons for service out of the jurisdiction,
“ or of which notice is to be given out of the jurisdiction,
“ shall be issued without the leave of a Court or Judge.”
Order II. R. 4.

“ A writ of summons to be served out of the jurisdiction,
“ or of which notice is to be given out of the jurisdiction,
“ shall be in Forms A. 2A and R. 3A, with such variations
“ as circumstances may require. Such notice shall be in
“ Form No. 3 in the same part, with such variations as
“ circumstances may require.” Order II. R. 5.

*Writ for service out of the Jurisdiction, or where notice in
lieu of service is to be given out of the Jurisdiction.*

“ 18 . [*Here put the letter and number.*]

Writ for
service out of
jurisdiction.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between A. B. Plaintiff,

“ and

“ C. D. and E. F. . . . Defendants.

“ Victoria, by the grace of God, &c.

“ To C. D., of .

“ We command you C. D., that within [*here insert the*
“ *number of days directed by the Court or Judge ordering the*
“ *service or notice*] after the service of this writ [*or notice*
“ *of this writ, as the case may be*] on you, inclusive of the
“ day of such service, you do cause an appearance to be
“ entered for you in an action at the suit of A. B.; and
“ take notice, that in default of your so doing, the plaintiff

“ may proceed therein, and judgment may be given in
 “ your absence.

“ Witness, &c.

“ Indorsement to be made on the writ before the issue
 “ thereof.

“ N.B.—This writ is to be served within twelve calendar
 “ months from the date thereof, or if renewed within six
 “ calendar months from the last renewal, including the
 “ day of such date, and not afterwards. Appearance to be
 “ entered at the Central Office, Royal Courts of Justice,
 “ London.

“ This writ was issued by of whose address
 “ for service is agent for of solicitor for
 “ the said plaintiff, who resides at .

“ The writ [*or notice of this writ*] was served by me at
 “ on the defendant on the day of .

“ Indorsed the day of .

“ Signed.

“ [*Address.*.]”

“ N.B.—This writ is to be used where the defendant or
 “ all the defendants or one or more defendant or defendants
 “ is or are out of the jurisdiction. Where the defendant
 “ to be served is not a British subject, and is not in British
 “ dominions, notice of the writ, and not the writ itself, is
 “ to be served upon him.”

*Notice of Writ in lieu of service to be given out of the
 Jurisdiction.*

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate).

“ 187 . [*Here put the letter and number.*] Notice of

“ Between A. B. Plaintiff, writ.

“ and

“ C. D., E. F. and G. H. Defendants.

“ To G. H., of .

“ Take notice, that A. B., of , has commenced an

“ action against you, G. H., in the Probate, Divorce and
 “ Admiralty Division of her Majesty’s High Court of
 “ Justice in England, by writ of that Court, dated the
 “ day of , A.D. 18 ; which writ is indorsed
 “ as follows [*copy in full the indorsements*], and you are
 “ required within days after the receipt of this
 “ notice, inclusive of the day of such receipt, to defend the
 “ said action, by causing an appearance to be entered for
 “ you thereto; and in default of your so doing, the said
 “ A. B. may proceed therein and judgment may be given
 “ in your absence.

“ You may appear to the said writ by entering an ap-
 “ pearance personally or by your solicitor at the Central
 “ Office, Royal Courts of Justice, London.

“ (Signed) A. B., of , &c.

“ or

“ X. Y., of , &c.

“ Solicitor for A. B.”

Date and
 teste of writ.

“ Every writ of summons, and also every other writ,
 “ shall bear date on the day on which the same shall be
 “ issued, and shall be tested in the name of the Lord
 “ Chancellor, or if the office of Lord Chancellor shall be
 “ vacant, in the name of the Lord Chief Justice of
 “ England.” Order II. R. 8.

ORDER III.

Indorsements of Claim.

Indorsement.

“ The indorsement of claim shall be made on every writ
 “ of summons before it is issued.” Order III. R. 1.

Essentials of
 indorsement.

“ In the indorsement required by Order II., rule 1, it
 “ shall not be essential to set forth the precise ground of
 “ complaint, or the precise remedy or relief to which the

Amendment
 of indorse-
 ment.

“ plaintiff considers himself entitled. The plaintiff may,
 “ by leave of the Court or judge, amend such indorsement
 “ so as to extend it to any other cause of action or any
 “ additional remedy or relief.” Order III. R. 2.

“ The indorsement of claim may be to the effect of such
 “ of the forms in Part II. of Appendix (A) hereto as shall
 “ be applicable to the case, or, if none be found applicable,
 “ then such other similarly concise form as the nature of
 “ the case may require.” Order III. R. 3.

Form of
indorsement.

“ In probate actions the indorsement shall show whether
 “ the plaintiff claims as creditor, executor, adminis-
 “ trator, residuary legatee, legatee, next of kin, heir
 “ at law, devisee, or in any and what other character.”
 Order III. R. 5.

Representa-
tive capacity
of probate
indorsements.

Forms of Indorsements of Claim.

“ 1. By an executor or legatee propounding a will in
 solemn form.

“ The plaintiff claims to be executor of the last will
 “ dated the day of of C. W., late of
 “ gentleman, deceased, who died on the day of
 “ and to have the said will established. This writ is
 “ issued against you as one of the next of kin of the said
 “ deceased [*or as the case may be*].

Indorsement.

“ 2. By an executor or legatee of a former will, or a
 “ next of kin, &c. of the deceased seeking to obtain the
 “ revocation of a probate granted in common form.

“ The plaintiff claims to be executor of the last will
 “ dated the day of of C. D., late of
 “ gentleman, deceased, who died on the day of
 “ and to have the probate of a pretended will of the said
 “ deceased, dated the day of revoked. This
 “ writ is issued against you as the executor of the said
 “ pretended will [*or as the case may be*].

“ 3. By an executor or legatee of a will when letters of
 “ administration have been granted as in an intestacy.

“ The plaintiff claims to be executor of the last will of
 “ C. D., late of gentleman, deceased, who died on
 “ the day of dated the day of .

“ The plaintiff claims that the grant of letters of ad-

“ministration of the personal estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

“4. By a person claiming a grant of administration as a next of kin of the deceased, but whose interest as next of kin is disputed.

“The plaintiff claims to be the brother and sole next of kin of C. D. of gentleman, deceased, who died on the day of intestate, and to have as such a grant of administration to the personal estate of the said intestate. This writ is issued against you because you have entered a caveat, and have alleged that you are the sole next of kin of the deceased [*or as the case may be.*]”

In determining who are to be defendants to the writ, and in settling the indorsement of claim, it is of importance to consider :—

Consideration
as to parties
to be defen-
dants to writ,
as to indorse-
ment of claim,
and as to
affidavit
verifying
indorsement.

1. Who are to be made defendants in the action, and whether all or some of them only shall be made defendants to the original writ.

All parties whose interests are or may by possibility be affected by the judgment claimed should be made defendants in the action in order to obtain an irrevocable grant. But at the commencement of an action it may be difficult to ascertain promptly and with certainty who all these parties may be, owing for instance in a testamentary suit to the plaintiff not having under his control all the deceased's testamentary papers, or to his not having necessary information as to the names and residences of the parties, and in such case it may be convenient to make some only of the proposed defendants parties to the writ in order that it may issue without delay, and to bring in the others afterwards by citation.

2. The nature of the claim to be put forward.

Thus in an action for proof of a will in solemn form, it is material to consider whether the plaintiff shall rely on one or more testamentary instruments, or whether he shall claim in the alternative, *c. g.* probate of an earlier

will in the event of the last will propounded by him being pronounced against, &c.

3. The nature of the defendants' interest.

The indorsement should show the grounds for bringing the defendants into the action, whether as next of kin or as a party entitled in distribution or as interested under another will; and if interested under another will, the date of the will and the nature of the interest should appear. In framing the affidavit verifying the indorsement, it is convenient to include in it the names of all the parties who by possibility might be affected by the decree claimed, and it will then serve as the affidavit to lead any subsequent citation that may be issued by way of notice to make other parties defendants.

ORDER IV.

Indorsement of Address.

“The solicitor of a plaintiff suing by a solicitor shall indorse upon every writ of summons and notice in lieu of service of a writ of summons the address of the plaintiff, and also his own name or firm and place of business, and also, if his place of business shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.” Order IV. R. 1.

Indorsement
of address of
solicitor.

“A plaintiff suing in person shall indorse upon every writ of summons and notice in lieu of service of a writ of summons his place of residence and occupation, and also, if his place of residence shall be more than three miles from Temple Bar, another proper place, to be called his address for service, which shall not be more than three

Indorsement
of address of
plaintiff.

“ miles from Temple Bar, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him.” Order IV. R. 2.

ORDER V.

Issue of Writs of Summons.

Practice as to
issue of writ.

Writs of summons in probate and administration actions issue only from the central office.

Approval at
Probate
Registry.
Writ.

By the practice the writ and affidavit verifying the indorsement must, in the first instance, be taken to the Probate Registry, and be approved of and marked by an officer of the Probate Registry before it is allowed to issue.

“ In any action other than a probate action, the plaintiff, wherever resident, may issue a writ of summons out of the registry of any district.” R. 1.

Probate writ
issues out of
central office.

“ Every writ of summons not issued out of a district registry shall be issued out of the central office.” R. 4.

Preparation of
writ.

“ Writs of summons shall be prepared by the plaintiff or his solicitor, and shall be written or printed, or partly written and partly printed, on paper of the same description as hereby directed in the case of proceedings directed to be printed.” R. 5.

Sealing of
writ.

“ Every writ of summons shall be sealed by the proper officer, and shall thereupon be deemed to be issued.” R. 6.

Copy to file.

“ The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy, written or printed, or partly written and partly printed, on paper of the description aforesaid, of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person.” R. 7.

Filing copy.
Entry in
cause book.

“ The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book to be called the cause book, which is to be kept in the manner in which cause books have heretofore been kept by the clerks of records and writs in the Court of

“Chancery, and the action shall be distinguished by the date of the year, a letter, and a number, in the manner in which causes are now distinguished in such last-mentioned cause books.” R. 8.

“The issue of writs of summons in probate actions shall be preceded by the filing of an affidavit made by the plaintiff, or one of the plaintiffs, in verification of the indorsement on the writ.” R. 10.

ORDER VI.

Concurrent Writs.

“The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word ‘concurrent,’ and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force.” R. 1.

Concurrent writs.
Teste.

“A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given, out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction.” R. 2.

Writs for service without jurisdiction.

ORDER VII.

Disclosure by Solicitors and Plaintiffs.

“Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority

Plaintiff's solicitor to disclose his authority.

“ or privity; and if such solicitor shall declare that the writ was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a judge.” R. 1.

ORDER VIII.

Renewal of Writ.

Currency of writ.

“ No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served there-with, the plaintiff may, before the expiration of the twelve months, apply to a judge, or the district registrar, for leave to renew the writ; and the judge or registrar, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 5 in Appendix (A), Part I; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.” R. 1.

Renewal of writ.

“ The production of a writ of summons purporting to be marked with the seal of the Court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and

“ of the commencement of the action as of the first date of
 “ such renewed writ for all purposes.” R. 2.

Order for Renewal of Writ.

“ In the High Court of Justice. 18 . No.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Principal Registrar in Chambers.

“ Between . . . Plaintiff,
 and
 . . . Defendant.

“ Upon hearing and upon reading the affidavit of
 “ filed the day of 18 , and

“ It is ordered that the writ in this action be renewed for
 “ six months from the date of its renewal, pursuant to the
 “ rules of the Supreme Court, Order VIII., Rule 1.

“ Dated the day of 18 .”

ORDER IX.

Service of Writ of Summons.

1. *Mode of Service.*

“ No service of writ shall be required when the defendant, Undertakers
 “ by his solicitor, agrees to accept service, and enters an to accept
 “ appearance.” R. 1. service.

“ When service is required the writ shall, wherever it is Personal
 “ practicable, be served in the manner in which personal service.
 “ service is now made, but if it be made to appear to the Substituted
 “ Court or to a judge that the plaintiff is from any cause service.
 “ unable to effect prompt personal service, the Court or
 “ judge may make such order for substituted or other ser-
 “ vice, or for the substitution of notice for service, as may
 “ seem just.” R. 2.

2. *On particular Defendants.*

“ When husband and wife are both defendants to the Husband and
 “ action, service on the husband shall be deemed good ser- wife.

“vice on the wife, but the Court or a judge may order that the wife shall be served with or without service on the husband.” R. 3.

Infant. “When an infant is a defendant to the action, service on his or her father or guardian, or if none, then upon the person with whom the infant resides or under whose care he or she is, shall, unless the Court or judge otherwise orders, be deemed good service on the infant; provided that the Court or judge may order that service made, or to be made, on the infant shall be deemed good service.” R. 4.

Lunatic. “When a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides or under whose care he or she is, shall, unless the Court or judge otherwise orders, be deemed good service on such defendant.” R. 5.

Corporation. “Whenever, by any statute, provision is made for service of any writ of summons, bill, petition, or other process upon any corporation, or upon any hundred, or the inhabitants of any place, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons may be served in the manner so provided.” R. 7.

Generally.

Indorsement of service. “The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made.” R. 13.

ORDER X.

Substituted Service.

Every application to the Court or a judge, under Order IX. r. 2, for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made.

Substituted
service.
Affidavit.

Order for Substituted Service.

“ In the High Court of Justice. 18 . No.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Principal Registrar in Chambers.

“ Between . . . Plaintiff,
and

. . . Defendant.

“ Upon hearing , and upon reading the affidavit
“ of filed the day of 18 , and

“ It is ordered that service of a copy of this order, and of
“ a copy of the writ of summons in this action, by sending
“ the same by a pre-paid post letter, addressed to the
“ defendant at shall be good and sufficient
“ service of the writ.

“ Dated the day of 18 .”

ORDER XI.

Service out of Jurisdiction.

“ Service of a writ of summons, or notice of a writ of
“ summons, may, by leave of the Court or judge, be
“ allowed out of the jurisdiction.” R. 2.

Leave for
service out of
jurisdiction.

Affidavit.

“ Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made.” R. 3.

Time for appearance.

“ Any order giving leave to effect such service or give such notice, shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.” R. 4.

Notice in lieu of service.

“ Notice in lieu of service shall be given in the manner in which writs of summons are served.” R. 5.

Order for Service out of Jurisdiction.

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Judge in Chambers.

“ Between . . . Plaintiff,
and
. . . Defendant.

“ Upon hearing and upon reading the affidavit of
“ filed the day of , 18 , and

“ It is ordered that the plaintiff be at liberty to issue
“ a writ for service out of the jurisdiction against .

“ And it is further ordered that the time for appearance
“ to the said writ be within days after the service
“ thereof, and that the costs of this application be .

“ Dated the day of , 18 .”

*Notice of Writ in lieu of Service to be given out of the
Jurisdiction.*

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between . . . Plaintiff,
and
. . . Defendant.

“ To of .

“ Take notice, that of has commenced an
“ action against you in the Probate, Divorce and
“ Admiralty Division of Her Majesty’s High Court
“ of Justice in England, by writ of that Court, dated
“ the day of , 18 , which writ is indorsed
“ as follows :—”

ORDER XII.

Appearance.

“ Except in cases otherwise provided for by these rules,
“ a defendant shall enter his appearance in London.”

R. 1.

“ Appearances entered in London shall be entered in the Appearance
“ central office. to be entered
in central
office.

“ In probate actions, notice of appearances entered shall
“ forthwith be given by the central office to the Probate Notice of
“ Registry.” R. 5. appearance.

“ A defendant shall enter his appearance to a writ of
“ summons by delivering to the proper officer a memo-
“ randum in writing, dated on the day of its delivery, and
“ containing the name of the defendant’s solicitor, or
“ stating that the defendant appears in person.

“ He shall at the same time deliver to the officer a dupli-
“ cate of the memorandum, which the officer shall seal with
“ the official seal, showing the date on which it is sealed,

“and then return to the person entering the appearance,
 “and the duplicate memorandum so sealed shall be a cer-
 “tificate that the appearance was entered on the day indi-
 “cated by the seal.”

Entry of Appearance, Order XVI., Rule 18.

“ 18 . No. .

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate).

“ Between . . . Plaintiff,
 and
 . . . Defendant.

“ Enter an appearance for . . . to the notice issued in
 “ this action on the . . . day of . . . , 18 . . . , by the
 “ defendant . . . under the Rules of the Supreme Court,
 “ Order XVI., Rule 18.

“ Dated the . . . day of . . . 18 . . .

“ (Signed)

“ of *

“ Agent for

“ of

* If this address be beyond three miles from the Royal Courts of Justice, an address for service within three miles thereof must be given.

“ The said defendant requires a statement of claim to
 “ be delivered.”

“ A defendant shall, on the day on which he enters an
 “ appearance to a writ of summons, give notice of his ap-
 “ pearance to the plaintiff's solicitor, or, if the plaintiff sues
 “ in person, to the plaintiff himself. The notice may be
 “ given either by notice in writing, served in the ordinary
 “ way at the address for service, or by prepaid letter directed
 “ to that address and posted on the day of entering
 “ appearance in due course of post, and shall in either
 “ case be accompanied by the sealed duplicate memo-
 “ randum.” R. Ga.

Notice of Entry of Appearance.

“ 18 . No. .

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate).

“ Between . . . Plaintiff,

and

. . . Defendant.

“ Take notice, that have this day entered an appearance at the Central Office, Royal Courts of Justice, for the defendant to the writ of summons in this action.

“ The said defendant requires delivery of a statement of claim.

“ Dated the day of 18 .

“ (Signed)

“ of

“ Agent for

“ Solicitor for the defendant .”

“ The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business, a place, to be called his address for service, which shall not be more than three miles from Temple Bar.” R. 7.

Address of
defendant's
solicitor for
service.

“ A defendant appearing in person shall state in such memorandum his address, a place, to be called his address for service, which shall not be more than three miles from Temple Bar.” R. 8.

Address of
defendant for
service.

“ If the memorandum does not contain such address it shall not be received ; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a judge, on the application of the plaintiff.” R. 9.

Memorandum
defective.

“ The memorandum of appearance shall be in the Form No. 6, Appendix (A), Part I., with such variations as the circumstances of the case may require.” R. 10.

Entry of Appearance.

" 188 . . . [Here put the letter and number.]

" In the High Court of Justice.

" Probate, Divorce and Admiralty Division.

" (Probate.)

" Between A. B. Plaintiff,
and

" C. D. Defendant.

" Enter an appearance for

" in this action.

" Dated the . . . day of

" (Signed)

" of*

" Agent for . . . of"

" E. 22.

Entry of Appearance Limiting Defence.

" In the High Court of Justice.

" Probate, Divorce and Admiralty Division.

" (Probate.)

" Between A. B. Plaintiff,
and

" C. D. Defendant.

" Enter an appearance for the defendant

" in this action. The said defendant limits his defence to

" the first codicil [or as the case may be] to the said will

" mentioned in the writ of summons.

" The address of . . . is

" (Signed)

" of*

" Agent for . . . of"

Entry of
appearance in
cause book.

" Upon the receipt of a memorandum of appearance,
" the officer shall forthwith enter the appearance in the
" cause book." R. 11.

Appearance
by several
defendants.

" If two or more defendants in the same action shall
" appear by the same solicitor and at the same time, the

“ names of all the defendants so appearing shall be inserted in one memorandum.” R. 13.

“ A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant shall be liable to an attachment.” R. 14.

Undertaking to appear.

“ A defendant may appear at any time before judgment. If he appear at any time after the time limited for appearance he shall, on the same day, give notice thereof to the plaintiff’s solicitor, or to the plaintiff himself if he sues in person, and he shall not, unless the Court or a judge otherwise orders, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ.” R. 15.

Appearance at any time before judgment.

“ In probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit showing how he is interested in the estate of the deceased.” R. 16.

Probate actions.

ORDER XIII.

Default of Appearance.

“ Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff may apply to the Court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the

Infant or person of unsound mind.

“ dwelling-house of the father or guardian, if any, of such
“ infant, unless the Court or judge at the time of hearing
“ such application shall dispense with such last-mentioned
“ service.” R. 1.

Actions
assigned to
Chancery
Division.

“ In actions assigned by the 34th section of the Act to
“ the Chancery Division, and in probate actions, and in all
“ other actions not by the rules in this order otherwise
“ specially provided for, in case the party served with the
“ writ does not appear within the time limited for appear-
“ ance, upon the filing by the plaintiff of a proper affidavit
“ of service the action may proceed as if such party had
“ appeared.” R. 9.

CHAPTER VII.

AFFIDAVIT AS TO SCRIPTS — PRACTICE IN PREROGATIVE COURT AND COURT OF PROBATE RETAINED—RULES AS TO SCRIPTS—SUITS IN FORMA PAUPERIS—CITING OF HEIRS-AT-LAW AND OTHER PARTIES INTERESTED IN REALTY—THE COURT OF PROBATE ACT, 1857, SECTS. 61 AND 63 —PRACTICE AS TO CITING, &c.—INTERVENTION OF HEIR-AT-LAW AND OTHER PARTIES INTERESTED IN REALTY—RULES AS TO PARTIES IN COURT OF PROBATE—ORDER XVI. AS TO PARTIES—ORDER XVIII. HOW INSANE PERSONS MAY SUE OR DEFEND.

THE term script in the Probate Court comprises all the testamentary papers of the deceased executed or unexecuted, whether a will or codicil or other testamentary paper, draft of a will or codicil or other testamentary paper, or written instructions for the same. In the Prerogative Court the first important step in a probate cause after service of the decree or citation on the defendant was the calling for the affidavit of scripts from the several parties to the cause, each of whom was required to bring in an affidavit stating what scripts had at any time come to his possession or knowledge, and annexing to his affidavit any script in his possession or under his control. If any document or other script brought in was torn or had alterations or obliterations on it, the affidavit was required to state its plight and condition at the time of its coming into his possession or under his control.

Affidavit as to scripts.

This practice as to the affidavit as to scripts was retained in the Court of Probate by the following rules, and is still in force:—

“ In testamentary causes the plaintiff and defendant,
 “ within eight days of the entry of an appearance on
 “ the part of the defendant, are respectively to file their

Plaintiff and defendant to file affidavit as to scripts within eight

days from
defendant's
appearance.
What consti-
tutes a script.

"affidavits as to scripts, whether they have or have not
"any script in their possession." R. 30, C. B.

"Every script which has at any time been made by or
"under the direction of the testator, whether a will, codicil,
"draft of a will or codicil, or written instructions for the
"same, of which the deponents has any knowledge, is
"to be specified in his affidavit of scripts; and every script
"in the custody or under the control of the party making
"the affidavit is to be annexed thereto, and deposited
"therewith in the registry." R. 31, C. B.

Form of
affidavit of
scripts.

"In the High Court of Justice,

"Probate, Divorce and Admiralty Division.

"(Probate.)

"Between A. B. Plaintiff,

"and

"C. D. Defendant.

"I, A. B. of , in the county of , party in this
"action, make oath and say, that no paper or parchment
"writing being or purporting to be or having the form or
"effect of a will or codicil or other testamentary disposition
"of E. F., late of , in the county of , deceased, the
"deceased in this action, or being or purporting to be in-
"structions for, or the draft of, any will, codicil, or other
"testamentary disposition of the said E. F. has at any
"time, either before or since his death, come to the hands,
"possession, or knowledge of me, this deponent, or to the
"hands, possession, or knowledge of my solicitors in this
"action so far as is known to me, this deponent, save and
"except the true and original last will of the said deceased
"now remaining in the principal registry of this Court,
" [*or hereunto annexed, or as the case may be*] the said will
"bearing date the day of , 18 [*or as the case*
"*may be*], also save and except [*here add the dates and*
"*particulars of any other testamentary papers of which the*
"*deponent has any knowledge.*

"(Signed) A. B.

"Sworn at , on the day of , 18 .
Before me, ."

“No party to the cause, nor his proctor, solicitor or attorney, shall be at liberty, except by leave of the judge, or of one of the registrars of the principal registry, to inspect the affidavit as to scripts, or the scripts annexed thereto, filed by any other party to the cause, until his own affidavit as to scripts shall have been filed.”
R. 32, C. B.

Inspection of scripts.

The only rule in the orders relating to scripts is Order XXI. r. 2, by which the plaintiff, unless otherwise ordered by the Court or a judge, is allowed six weeks to deliver his statement of claim from the entry of appearance by the defendant, but he is not compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit as to scripts.

Ord. 21, r. 2.
Affidavit as to scripts.

“When any pencil writing appears on a will, script, or other document filed in the registry, a fac-simile copy of the will, script, or other document, or of the pages or sheets thereof containing the pencil writing, must also be filed with those portions written in red ink which appear in pencil in the original. Such copy must be examined by an examiner in the registry.” R. 75, C. B.

Pencil writing on will or script, &c.

Any person who is not worth 25*l.*, after payment of his just debts, save and except his wearing apparel, is allowed to prosecute an action *in formâ pauperis* (11 Hen. VII. c. 12 and 23 Hen. VIII. c. 15).

Of suits *in formâ pauperis*.

“Any person desirous of prosecuting a suit *in formâ pauperis* is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.” R. 23, C. B.

“No person shall be admitted to prosecute a suit *in formâ pauperis* without the order of the judge; and to obtain such order, the case laid before counsel, and his opinion thereon, with an affidavit of the party, or of his or her proctor, solicitor or attorney, that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and

“an affidavit by the party applying that he or she is not worth 25*l.* after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.” R. 24, C. B.

“Where a pauper omits to proceed to trial, pursuant to notice, he or she may be called upon by summons to show cause why he or she should not pay costs, though he or she has not been dispaupered, and why all future proceedings should not be stayed until such costs are paid.” R. 25, C. B.

The heir at law, devisee or other person interested in realty to be parties to action.

The heir at law of the deceased, a devisee under any will of the deceased, or other person interested, or pretending an interest, in any of his real estate disposed of by a will propounded, should be made a defendant to the action, unless the Court shall, with reference to the circumstances of the property of the deceased or otherwise, think fit to direct that the action may proceed without their being cited. See sects. 61 and 63 of the Court of Probate Act, 1857.

The Court of Probate Act, 1857, s. 61.

“Where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless, in the several cases aforesaid, the will affects only personal estate, the heir at law, devisees and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin, or others having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders and to the discretion of the Court.” Sect. 61.

Probate Act, 1857, s. 63.

“Nothing herein contained shall make it necessary to

“cite the heir-at-law or other persons having or pretending
 “interest in the real estate of a deceased person, unless it
 “is shown to the Court, and the Court is satisfied, that the
 “deceased was at the time of his decease seised of or en-
 “titled to or had power to appoint by will some real estate
 “beneficially, or in any case where the will propounded,
 “or of which the validity is in question, would not in the
 “opinion of the Court, though established as to personalty,
 “affect real estate, but in every such case, and in any other
 “case, in which the Court may, with reference to the cir-
 “cumstances of the property of the deceased or otherwise,
 “think fit, the Court may proceed without citing the heir
 “or other persons interested in real estate, provided that
 “the probate, decree or order of the Court shall not in any
 “case affect the heir or any person in respect of his interest
 “in real estate, unless such heir or person has been cited
 “or made party to the proceedings, or derives title under
 “or through a person so cited or made party.” Sect. 63.

The practice of the Court in regard to citing or making parties to the suit the heir-at-law or persons interested in the real estate, is as follows:—Where the heir-at-law or person interested in the real estate has appeared in the suit in respect of the personal estate, he may be made a party in respect of the real estate by summons. But where the heir-at-law or persons interested in the real estate have not appeared in the suit, they should be made parties by being cited by either party to the suit, in pursuance of an order obtained for that purpose on motion made before the judge, or registrar in the absence of judge. (Sect. 61 of the Probate Act, 1857; *Kennaway v. Kennaway*, 1 P. Div. 148; 45 L. J. 86.) The judge or registrar, before making the order, should be satisfied by affidavit that the testator died seized of real estate, and that the will in question affects or purports to affect the real estate of the testator, and may then make any special directions as to the persons to be cited which he may think the justice of the case requires.

Practice as to making heirs at law and parties interested in real estate parties.

R. 78.

“ Any person proceeding to prove a will in solemn form
 “ or to revoke the probate of a will, may, if the will affects
 “ real estate, apply to the judge, or to a registrar in his
 “ absence, for an order authorizing him to cite the heir or
 “ heirs at law or other person or persons having or pre-
 “ tending interest in such real estate to see proceedings;
 “ and the judge or registrar, on being satisfied by affidavit
 “ that the will in question does affect or purport to affect
 “ the real estate, will make an order authorizing the per-
 “ son applying to cite the heir or heirs at law or other such
 “ person or persons as aforesaid; provided always, that the
 “ judge may give any special directions as to the persons
 “ to be cited which he may think the justice of the case
 “ requires.” R. 78, C. B.

Where the plaintiff propounded a will by her guardian as sole legatee named therein, and was also sole devisee, and the defendant was also heiress-at-law of the deceased, who, as a party entitled in distribution, opposed the will, the Court, upon motion made on behalf of the defendant, directed the plaintiff to be cited by her guardian as such devisee. *Emberley v. Trecanion*, 4 S. & T. 197; 29 L. J. 142. The Court will direct citation against the devisees in an earlier will, when a later will is propounded. . *Lister and others v. Smith*, 3 S. & T. 53; 32 L. J. 13.

Where a defendant has appeared in the action, the application should not be made until a statement of defence has been delivered, or the time for delivering a statement of defence has expired. But where no appearance has been entered in an action on behalf of a party served with a writ of summons as interested in the personal estate, the application should be made after the statement of claim has been filed in the registry, and should be supported by an affidavit that the plaintiff intends to prove the will in solemn form, and is desirous that the probate should bind the real estate (*Domvile and others v. Domvile*, 4 S. & T. 17; 34 L. J. 79); but the order is not made unless all the

next of kin and parties interested in distribution have been cited. *Moore and Barber v. Holgate*, 1 L. R. 101; 35 L. J. 46.

One of the great objects of the 61st and two following sections of the Probate Act, 1857, is to prevent double trials; and this object, where the will relates to realty as well as personalty, can only be effected by citing the heir-at-law or other persons interested in such realty. The Court, therefore, on application made, will generally permit the citation to issue, and the fact of a co-heir being an infant, or child of the plaintiff, is no ground for the Court refusing to allow such co-heir to be cited. *Nicholls and Freeman v. Binns*, 1 S. & T. 19; 27 L. J. 14.

The heir-at-law and other persons interested in the real estate affected by the will, *though not cited*, may become parties and intervene, with leave of the judge or one of the registrars, obtained by order made on summons (R. 6, C. B.), for their respective interests in "such real estate." (Sect. 61 of Probate Act, 1857.)

Heir-at-law or other persons interested in the realty may intervene.

It was a rule of the Prerogative Court that, when a suit was pending, a party whose interest might by possibility be affected by the suit, should be allowed to intervene to protect his interest. He was called an intervener; and by Rule 6, C. B., it is provided that parties who, previously to the passing of the Probate Act, had a right to intervene in a cause, may do so with leave of the judge or one of the registrars, obtained on order by summons, subject to the same limitations and to the same rules with respect to costs as heretofore, *i. e.* as in the Prerogative Court.

The distinction between an intervener and a defendant, properly so called, in the Prerogative and Probate Courts was, that an intervener was a person who put in an appearance in a suit while the suit was pending. If he put in an appearance on the warning of his caveat, or in answer to a citation served upon him by the plaintiff at the commencement of the suit, he was called a defendant; or if in answer to a citation to see proceedings, he was called a party cited.

By the practice of the Prerogative Court, interveners took the cause as they found it at the time of their intervention. Hence they could of *right* do only what they might have done had they been parties in the first instance, or had their intervention occurred at an earlier stage of the cause. An intervener could not, therefore, of right, when a cause was formally concluded by the publication of evidence, give a plea in the principal cause, but the Court might allow him to do so *ex gratiâ* on cause shown. *Clements v. Rhodes*, 3 Add. 40.

Who and under what circumstances a person is entitled to be a party to a probate action has been considered in Chap. V. *ante*, pp. 80—82. The following rules of Court are now in force in relation to parties to suits:—

“Executors or other parties, who, previously to the passing of the Court of Probate Act, 1857, might prove wills in solemn form of law, shall be at liberty to prove wills under similar circumstances, and with the same privileges, liabilities and effect as heretofore.” R. 4, C. B.

“Next of kin and others, who, previously to the passing of the said Act, had a right to put executors or parties entitled to administration with will annexed upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs as heretofore.” R. 5, C. B.

“Parties who, previously to the passing of the said Act, had a right to intervene in a cause may do so, with leave of the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore.” R. 6, C. B.

ORDER XVI.

Parties.

“ All persons may be joined as plaintiffs in whom the Plaintiffs.
 “ right to any relief claimed is alleged to exist, whether
 “ jointly, severally, or in the alternative. And judgment Judgment.
 “ may be given for such one or more of the plaintiffs as
 “ may be found to be entitled to relief, for such relief as
 “ he or they may be entitled to, without any amendment.
 “ But the defendant, though unsuccessful, shall be en- Costs.
 “ titled to his costs occasioned by so joining any person or
 “ persons who shall not be found entitled to relief, unless
 “ the Court in disposing of the costs of the action shall
 “ otherwise direct.” R. 1.

“ All persons may be joined as defendants against whom Defendants.
 “ the right to any relief is alleged to exist, whether jointly,
 “ severally, or in the alternative. And judgment may be Judgment.
 “ given against such one or more of the defendants as may
 “ be found to be liable, according to their respective liabili-
 “ ties, without any amendment.” R. 3.

“ It shall not be necessary that every defendant to any A defendant not interested in every cause of action.
 “ action shall be interested as to all the relief thereby
 “ prayed for, or as to every cause of action included
 “ therein; but the Court or a judge may make such order
 “ as may appear just to prevent any defendant from being
 “ embarrassed or put to expense by being required to attend
 “ any proceedings in such action in which he may have no
 “ interest.” R. 4.

“ Married women and infants may respectively sue as Married women and infants.
 “ plaintiffs by their next friends, in the manner practised
 “ in the Court of Chancery before the passing of this Act;
 “ and infants may, in like manner, defend any action by
 “ their guardians appointed for that purpose. Married
 “ women may also, by the leave of the Court or a judge,
 “ sue or defend without their husbands and without a next
 “ friend, on giving such security (if any) for costs as the
 “ Court or a judge may require.” R. 8.

“Subject to the provisions of the Act, and these rules, the provisions as to parties, contained in sect. 42 of 15 & 16 Vict. c. 86, shall be enforced as to actions in the High Court of Justice.” R. 11.

Probate
actions.

“Subject as last aforesaid, in all probate actions the rules as to parties, heretofore in use in the Court of Probate, shall continue to be in force.” R. 12.

Misjoinder.
Amendment.

“No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out, and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added.

Plaintiff.

“No person shall be added as a plaintiff suing without a

Next friend.

“next friend, or as the next friend of a plaintiff under

Consent.

“any disability, without his own consent thereto. All

Defendant.

“parties whose names are so added as defendants shall be

Service.

“served with a summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.” R. 13.

Striking out
or substituting
a plaintiff
or defendant.

“Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.”

R. 14.

Amendment
of writ.

“Where a defendant is added, unless otherwise ordered

“ by the Court or judge, the plaintiff shall file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served.” R. 15.

“ If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or judge, be amended in such manner as the making such new defendant a party shall render desirable, and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice or afterwards, within four days after his appearance.” R. 16.

Amendment and service of statement of claim.

“ Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a judge may on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined.” R. 17.

Notice to third parties interested.

“ When, under Rule 17 of this order, it is made to appear to the Court or a judge at any time before or at the trial that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and defendant and any other person, or between any or either of them, the Court or a judge before or at the time of making the order for having such question determined, shall direct such notice to be given by the plaintiff at such time and to such person, and in such manner as may be thought proper, and if made at the trial the judge may postpone such trial as he may think fit.” R. 19.

The Court or judge may direct plaintiff to give notice to third parties.

Directions as to mode of determining questions in action.

“If a person not a party to the action served under these rules appears pursuant to the notice, the party giving the notice may apply to the Court or a judge for directions as to the mode of having the question in the action determined; and the Court or judge, upon the hearing of such application, may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions as to the Court or a judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question.” R. 21.

ORDER XVIII.

Actions by and against Lunatics and Persons of Unsound Mind.

How insane persons may sue or defend.

“In all cases in which lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action by their committees or guardians appointed for that purpose.”

CHAPTER VIII.

GENERAL RULES OF PLEADING — ORDER XIX. INTEREST
CAUSES—PROBATE RULES, 61 AND 62.

ORDER XIX.

Pleading Generally.

“THE following rules of pleading shall be substituted
“for those heretofore used in the High Court of Chancery
“and in the Courts of Common Law, Admiralty, and
“Probate.” R. 1. Old rules
abolished.

“The plaintiff shall within such time and in such man- Pleading.
“ner as hereinafter prescribed, deliver to the defendant
“after his appearance a statement of his complaint and of
“the relief or remedy to which he claims to be entitled. Claim.
“The defendant shall within such time and in such manner Defence.
“as hereinafter prescribed deliver to the plaintiff a state-
“ment of his defence, set-off, or counter-claim (if any),
“and the plaintiff shall in like manner deliver a statement
“of his reply (if any) to such defence, set-off, or counter- Reply.
“claim. Such statements shall be as brief as the nature
“of the case will admit, and the Court in adjusting the
“costs of the action shall inquire at the instance of any
“party into any unnecessary prolixity, and order the costs
“occasioned by such prolixity to be borne by the party Costs of
prolixity.
“chargeable with the same.” R. 2.

“Every pleading shall contain as concisely as may be a Contents of
pleading.
“statement of the material facts on which the party plead-
“ing relies, but not the evidence by which they are to be
“proved, such statement being divided into paragraphs,
“numbered consecutively, and each paragraph containing,
“as nearly as may be, a separate allegation. Dates, sums,
“and numbers shall be expressed in figures and not in

“ words. Signature of counsel shall not be necessary.”

R. 4.

Printing.

“ Every pleading which shall contain less than three folios of seventy-two words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed.” R. 5.

Delivery of pleading.

“ Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer.”

R. 6.

Delivery to parties.
Pleading :
how marked.

“ Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, and with the reference to the letter and number of the action, the division to which and the judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor.” R. 7.

Claim of relief.

“ Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his statement of defence. If the plaintiff's claim be for discovery only the statement of claim shall show it.” R. 8.

Distinct claim or defences.

“ Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule

“ shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts.” R. 9.

“ Where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counter-claim.” R. 10.

Set-off or counter-claim: how stated.

“ In probate actions where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest.” R. 12.

Denial of interest in probate action.

“ No plea or defence shall be pleaded in abatement.” R. 13.

Pleas in abatement abolished.

“ Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.” R. 17.

Allegations not denied are admitted.

“ Each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as for instance, fraud, or that any claim has been barred by the Statute of Limitations or has been released.” R. 18.

What facts must be pleaded.

“ No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.” R. 19.

Inconsistent pleadings.

“ It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim,

Specific denial.

“ but each party must deal specifically with each allegation of fact of which he does not admit the truth.” R. 20.

Joinder of
issue.

“ Subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.” R. 21.

Evasive
denial.

“ When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.” R. 22.

Contents of
documents.

“ Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material.” R. 24.

Malice, fraud
or other
mental state.

“ Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.” R. 25.

Notice.

“ Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material.” R. 26.

“ Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.” R. 28.

Interest Causes.

“ In interest causes, as heretofore, each party shall be at liberty to deny the interest of the other; and in such cases both parties may, with and subject to the permission of the judge, adduce proof on one and the same trial of their interests respectively.” R. 61, C. B.

“ In interest causes the pleading of each party must show on the face of it that no other person exists having a prior interest to that of the claimant.” R. 62, C. B.

CHAPTER IX.

STATEMENT OF CLAIM—ORDER XXI.—FORM OF ORDINARY STATEMENT OF CLAIM—SPECIAL AVERMENTS WHERE A FEME COVERTE HAS THE JUS DISPONENDI BY VIRTUE OF A POWER, OR OF PROPERTY HAVING BEEN SETTLED TO HER SEPARATE USE, OR BELONGING TO HER SEPARATE USE UNDER THE MARRIED WOMEN'S PROPERTY ACT, 1871, OR UNDER A PROTECTION ORDER, OR A DECREE OF JUDICIAL SEPARATION, OR BY VIRTUE OF HER WILL HAVING BEEN ASSENTED TO BY HER HUSBAND, OR BY REASON OF HIS BEING A CONVICT, OR BANISHED THE KINGDOM—FORMS OF EXECUTION OF WILLS UNDER 1 VICT. C. 26 AND 24 & 25 VICT. C. 114, OF BRITISH SUBJECTS MADE ABROAD, OF FOREIGNERS DOMICILED ABROAD — PRIVILEGED WILLS OF SOLDIERS AND SEAMEN — LOST WILL—INCORPORATION, OBLITERATIONS, INTERLINEATIONS, ERASURES AND ALTERATIONS — TESTAMENTARY CAPACITY — ADMINISTRATION ACTIONS — ACTIONS FOR REVOCATION OF PROBATE—ACTIONS FOR REVOCATION OF LETTERS OF ADMINISTRATION.

ORDER XXI.

Statement of Claim.

“In Probate actions the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited for his appearance, in case he has made default; but where the defendant has appeared the plaintiff shall not be compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit as to scripts.” R. 2.

The following is a form of statement of claim pro-
pounding a will and codicil for probate in solemn form :—

Probate of
will in solemn
form.

“ In the High Court of Justice, 18 . B. No.

“ Probate, Divorce, and Admiralty Division.

“ (Probate.)

“ Writ issued [].

“ Between A. B. Plaintiff,

and

“ E. F. Defendant.

Statement of Claim.

“ 1. C. T., late of Bicester in the county of Oxford, Claim.
“ gentleman, deceased, who died on the 20th of January,
“ 1875, at Bicester, being of the age of twenty-one years,
“ made his last will, with one codicil thereto, the said will
“ bearing date the 1st day of October, 1874, and the said
“ codicil the 1st of January, 1875, and in the said will
“ appointed the plaintiff sole executor thereof.

“ 2. The said will and codicil were signed by the
“ deceased [*or* by X. Y., in the presence and by the
“ directions of the deceased, *or* signed by the deceased,
“ who acknowledged his signature, *or as the case may be*]
“ in the presence of two witnesses present at the same
“ time, the said will in the presence of H. P. and J. R.,
“ and the said codicil in the presence of J. D. and G. E.,
“ and who subscribed the same in the presence of the said
“ deceased.

“ 3. The deceased was at the time of the execution of
“ the said will and codicil respectively of sound mind,
“ memory and understanding.

“ The plaintiff claims :—

“ That the Court shall decree probate of the said
“ will and codicil in solemn form of law.”

All facts material to establish the plaintiff's claim should
appear in his statement of claim.

Thus in paragraph 1 in the case of a testatrix, it
should not only appear that she was of full age when she

made the will propounded, but also whether she died a spinster, a widow, or a feme coverte,—and if she died a widow, whether she was a widow when she made the will; and if she was a feme coverte when she made the will, the statement of claim should disclose her title as a married woman to make it.

Cases in which a feme coverte is entitled to make a will.

Of property over which she has power of appointment by will.

Of property belonging to her for her separate use.

Of property held by her for her separate use under 33 & 34 Vict. c. 93.

Of wages, &c.

Deposits in savings banks. Sect. 2.

A married woman dying domiciled in England may during coverture dispose by will:

(1.) Of any personal estate in respect of which she has a power of testamentary disposition vested in her by deed or will notwithstanding her coverture. In such case the statement of claim should contain an averment that she made the will in pursuance of a power contained in the instrument creating the power, and of every other power enabling her in that behalf.

(2.) Of any personal estate which at the time of her death belonged to her for her separate use. This will include all property given to her by deed or will for her separate use—as well as all the savings derived from property held for or by her for her separate use; also any property which her husband has either by express or implied engagement or arrangement treated as property belonging to her for her separate use, and the savings from such property. *Haddon v. Fladgate*, 1 S. & T. 48; 27 L. J. 21.

(3.) Of property belonging to her for her separate use under the provisions of the Married Women's Property Act, 1870, namely:

(a) Of property acquired by her as wages, earnings, or in any employment, occupation or trade which she carried on separately from her husband, or which she acquired through the exercise of literary, artistic or scientific skill since August 9th, 1870, the date when the Married Women's Property Act, 1870 (see sect. 1, 33 & 34 Vict. c. 93) came into operation.

(b) Also of deposits in savings banks made in her name since August 9th, 1870, whether before or after her marriage. (See *Ib.* sect. 2.)

(c) Also of money in the public stocks or funds not being less than 20*l*. standing or having been transferred to her name as a married woman, or as an intended married woman, in consequence of a written application made by her as a married woman, or as a woman about to be married, to the Governor of the Bank of England or Ireland, she being at the time of applying entitled to the same. See *Ib.* sect. 3.

Money in
public stocks.
Sect. 3.

(d) Also of any fully paid up shares, or of any debenture or debenture stocks, or of any stock to the holding of which no liability is attached, in any incorporated or joint stock company, registered on her written application in her name as a married or intended married woman in such incorporated or joint stock company, she being at the time of applying entitled to the same. See *Ib.* sect. 4.

Shares, &c.
in a joint
stock com-
pany.
Sect. 4.

(e) Also of any share, benefit, debenture, right or claim whatsoever, in, to, or upon the funds of any industrial and provident society, or of any friendly society, or of any benefit building society, or of any loan society duly registered, to the holding of which share, benefit, or debenture no liability is attached, which was in consequence of an application in writing made by a married woman or a woman about to be married, to the committee of management or to the trustees of the society, entered in the books of the society, in the name or intended name of the woman as a married woman entitled to her separate use—provided she at the time of applying was entitled to the same. See *Ib.* sect. 5.

Shares, &c.
in a provident
society, &c.
Sect. 5.

(f) Also of any personal property to which she has during coverture become entitled since the 9th of August, 1870, as next-of-kin, or as one of the next-of-kin of an intestate, or to any sum of money not exceeding 200*l*. to which she has become entitled since that date under any deed or will, but without prejudice to the trusts of any settlement affecting the same. See *Ib.* sect. 7.

Property
taken under
an intestacy
or a legacy
under 200*l*.
Sect. 7.

(g) Also to the proceeds of any policy of insurance effected and expressed on the face of it to be effected upon

Proceeds of
policy of
insurance

effected by
her.
Sect. 10.

Property of a
wife judicially
separated.

20 & 21 Vict.
c. 85, s. 25.
Matrimonial
Causes Act,
1857.

Property of a
wife who has
obtained a
protection
order.

20 & 21 Vict.
c. 85, s. 21.
Matrimonial
Causes Act,
1857.

her own life or the life of her husband for her separate use. See *Ib.* sect. 10.

(4.) Of any property acquired by or which may come to or devolve upon a married woman who is judicially separated from her husband from the date of the sentence of separation. See 20 & 21 Vict. c. 85, s. 25.

“In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between her husband and herself whilst separate.”

(5.) Also of all personal property acquired by a married woman, deserted by her husband, by her own industry since the date of his desertion, and who has obtained a protection order, as well as of all property which she has become possessed of since such date. See 20 & 21 Vict. c. 85, s. 21.

“A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors or any person claiming under him: and such magistrates or justices or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining her-

“self by her own industry or property, may make and give
 “to the wife an order protecting her earnings and property
 “acquired since the commencement of such desertion, from
 “her husband and all creditors and persons claiming under
 “him, and such earnings and property shall belong to
 “the wife as if she were a feme sole. . . .
 “If any such order of protection be made, the wife
 “shall, during the continuance thereof, be and be deemed
 “to have been, during such desertion of her, in the like
 “position in all respects, with regard to property and con-
 “tracts, and suing and being sued, as she would be under
 “this act if she obtained a decree of judicial separation.”

(6.) Of property acquired by a married woman, whose husband is a convict, after his conviction, and until the expiration of the sentence. *In the goods of Martin*, 2 Roberts. 405; *In the goods of Coward*, 4 S. & T. 46; 34 L. J. 120.

Property of wife of a convict.

(7.) Of personal property belonging to a married woman whose husband is banished by Act of Parliament. *Portland v. Prodgers*, 2 Vern. 104; *Crompton v. Collinson*, 2 Bro. C. C. 385.

Property of a wife whose husband is banished by act of parliament.

(8.) A married woman may during coverture make a will of personalty with her husband's assent, provided he has knowledge of the contents of the particular will (*Willock v. Noble and others*, L. R., 7 English and Irish Appeals, 580), and does not subsequently withdraw his assent, and survives her (*In the goods of Smith*, 1 S. & T. 127; 27 L. J. 39); and provided he gives his assent to the will after her death. *Maus v. Sheffield*, 1 Roberts. 364; 4 Notes of Cases, 350.

Will of a feme covert made with husband's assent.

(9.) A married woman, being the sole or surviving executrix, may make a will appointing an executor to carry on the chain of representation to her testator's estate.

A married woman executrix may appoint by will an executor.

II. In paragraph 2 of the statement of claim, the form of the execution of the will is pleaded.

Form of execution of wills.

The form required for the execution of a valid will by

a person domiciled in England (except in the case of a privileged will) since January 1, 1838, is prescribed by section 9 of the Wills Act (1 Vict. c. 26), and by section 1 of the Wills Amendment Act, 1852 (15 & 16 Vict. c. 24).

The Wills
Act, 7 Will. 4
& 1 Vict.
c. 26, s. 9.

“No will shall be valid unless it shall be in writing, and
“executed in manner hereinafter mentioned (that is to
“say): it shall be signed at the foot or end thereof by the
“testator, or by some other person in his presence and by
“his direction; and such signature shall be made or
“acknowledged by the testator in the presence of two or
“more witnesses present at the same time, and such wit-
“nesses shall attest and shall subscribe the will in the
“presence of the testator, but no form of attestation shall
“be necessary.” 1 Vict. c. 26, s. 9.

Wills Amend-
ment Act,
1852, s. 1.

“It is enacted that every will shall, so far only as
“regards the position of the signature of the testator, or
“of the person signing for him as aforesaid, be deemed to
“be valid within the said enactment, as explained by this
“Act, if the signature shall be so placed at or after, or follow-
“ing or under, or beside, or opposite to the end of the will,
“that it shall be apparent on the face of the will that the
“testator intended to give effect by such his signature to
“the writing signed as his will, and that no such will shall be
“affected by the circumstance that the signature shall not
“follow or be immediately after the foot or end of the
“will, or by the circumstance that a blank space shall
“intervene between the concluding word of the will and
“the signature; or by the circumstance that the signature
“shall be placed among the words of the testimonium
“clause, or of the clause of attestation, or shall follow or
“be after, or under the clause of attestation, either with
“or without a blank space intervening, or shall follow or
“be after, or under, or beside the names or one of the
“names of the subscribing witnesses; or by the circum-
“stance that the signature shall be on a side or page, or
“other portion of the paper or papers containing the will,
“whereon no clause or paragraph, or disposing part of

“ the will, shall be written above the signature; or by the
 “ circumstance that there shall appear to be sufficient space
 “ on or at the bottom of the preceding side or page or
 “ other portion of the same paper on which the will is
 “ written to contain the signature; and the enumeration
 “ of the above circumstances shall not restrict the gene-
 “ rality of the above enactment; but no signature under
 “ the said Act or this Act shall be operative to give effect
 “ to any disposition or direction which is underneath, or
 “ which follows it: nor shall it give effect to any disposi-
 “ tion or direction inserted after the signature shall be
 “ made.” 15 & 16 Vict. c. 24, s. 1.

For the decided cases, on what constitutes and what does not constitute a valid execution of a will within these statutes, see *post*, pp. 152—159.

For the making of a valid will disposing of personalty before 1 Vict. c. 26 came into operation, no solemnities of any kind were necessary. By the Statute of Frauds a will of personalty was required generally to have been reduced into writing in the testator's lifetime; but the document was not required to be in the testator's handwriting, or even to have been signed by him, provided sufficient proof was produced to satisfy the Court that it expressed the testator's last wishes regarding the disposition of his personal estate after his death.

Wills made before 1 Vict. c. 26 came into operation.

A will made by a British subject (which includes a naturalized British subject, *In the goods of Gally*, 1 P. Div. 438; 45 L. J. 107) out of the United Kingdom, whatever be the domicile of such person at the time of making the same, or at the time of his or her death, is valid as regards personal estate in England, Ireland, or Scotland, if it is made according to the forms required by the law of the place where it was made, or by the law of the place of the testator's domicile at the time of its being made, or by the law of that part of her Majesty's dominions where he had his domicile of origin. 24 & 25 Vict. c. 114, s. 1; App. I.

24 & 25 Vict. c. 114, s. 1. Formalities of execution of will made out of United Kingdom by a British subject.

A will made within the United Kingdom by any British Sect. 2.

Where a will made in United Kingdom by a British subject where-ever domiciled.

subject (including a naturalized British subject), whatever be the domicile of such person at the time of making the same, or at the time of his or her death, is valid as regards personal estate, if the same be executed according to the forms required by the laws for the time being in force for that part of the United Kingdom where the same was made. *Ib.* s. 2.

Wills of moveables by foreigners domiciled abroad.

For the making of a valid will disposing of moveable estate in England by a person dying domiciled abroad, who was not a British subject, the forms to be observed are those required by the law of the testator's domicile in accordance with the maxim "*Mobilia sequuntur personam.*"

Wills of leaseholds by persons domiciled abroad.

But the will of a British subject or of a foreigner dying domiciled abroad, to pass leaseholds in England, must have been executed in the form prescribed by the Wills Act. *Frere v. Lord Carbery*, L. R., 16 Eq. Cas. 461, 466.

The law of the domicile of the testator governs the questions as to his testacy or intestacy, or to the construction of his will, and as to the rights of those who claim to be his next of kin. Where, therefore, a will has been made by a testator who has died domiciled abroad, and the Court of his domicile has granted probate of that will, it is the duty of the English Probate Court, if he has left moveable property in England, to grant ancilliary probate to the foreign executors. The law on this point is thus laid down by Lord Westbury, L. C., in *Enohin v. Wyllie*, 10 H. L. R. 13:—
 "I hold it to be now put beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicile. It is the right and duty of that judge to constitute the personal representative of the deceased. To the Court of the domicile belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator, is the prerogative of the judge of the domicile. In

“ short, the Court of the domicile is the *forum concursus* to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort.”

In such cases the statement of claim should contain averments of the place abroad where the testator died domiciled, of the formalities required to be observed in the making of a valid will disposing of moveable estate by the law of that place, and that the testator had, in the making of the will in question, complied with those formalities.

Special averments in statement of claim.

There are two other kinds of wills called privileged wills, permitted to be made by soldiers when engaged on active military service, or by mariners or seamen when at sea, in which the formalities prescribed by the Wills Act are not required to be followed.

Privileged wills.

The principle of this exception was borrowed from the Roman law, and was expressly reserved to soldiers and sailors by the 23rd section of the Statute of Frauds (29 Car. 2, c. 3), which, after providing “ that wills of personal estate shall be in writing or committed to writing within six days after the making of the same,” excepted from its operation the wills made by soldiers in actual military service, or by mariners or seamen at sea, in these words:—

“ Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or

29 Car. 2, c. 3, s. 23.

seaman being at sea, may dispose of his moveables, wages and personal estate, as he or they might have done before the making of this Act.” This exception is retained in

the Wills Act (1 Vict. c. 26, s. 11), in these words: “Pro-

1 Vict. c. 26, s. 11.

vided always, and be it further enacted, that any soldier being in active military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.”

Upon this section three questions have arisen—1. Is a soldier engaged on actual military service, or a mariner or seaman at sea, competent to make a will, under the age of twenty-one years? 2. What formalities are required for a

privileged will? 3. What constitutes being engaged on active military service, or being at sea, within the meaning of the statute?

1. Is a soldier engaged on actual military service, or a mariner at sea, competent to make a will when under age?

Soldiers when on military expeditions, and mariners when at sea, may make wills of personalty at the age of fourteen.

According to Swinburne, Pt. I., sect. 14, par. 2, a soldier on active service is not disabled to make a testament by any impediment, unless it be by reason of *furor* or lack of reason, or for some other disability allowed *jure gentium*. Before and after the Statute of Frauds, a soldier engaged on actual military service, or a sailor or seaman at sea, could make a will of personalty any time after the age of fourteen; and this privilege is still reserved to soldiers notwithstanding sect. 7 of the Wills Act (*In the goods of Farquhar*, 4 Notes of Cases, 651); and, on the same grounds, is reserved to mariners or seamen making wills whilst they are at sea.

2. The formalities required for making a privileged will are simply a declaration in writing, or orally, of the mode in which the testator wishes his personal estate to be disposed of after his death. If the declaration is made orally, the Court must have before it evidence sufficient to satisfy it of the substance of the declaration, and of the fact that it was intended to be testamentary.

By the Roman law, if a soldier wrote his last wishes in blood on his shield, or in the dust of the field with his sword, it was treated as a good testament. *Cod.* 6. 21. 15 a.

3. The leading case on what constitutes the being *engaged on* actual military service is that of *Drummond v. Parish*, 3 Curt. 522, in which Sir Herbert Jenner Fust held that the principle of the exception was borrowed from the civil law, that in order to ascertain the extent and meaning of the exception the civil law might fairly be resorted to (*ibid.* 531); and after referring to the civil law he decided that probate could only be granted of the will of a soldier as a military

will, if it were made whilst he was engaged on a military expedition.

The privilege of making testaments, without the observance of the ordinary formalities, was granted to the Roman soldiers by Julius Cæsar as a temporary concession, and was made a general rule by Nerva, and was confirmed by Trajan.

The law relating to military wills is thus laid down by Justinian in his Institutes, Lib. II. tit. 11, "*De Militari Testamento.*" "*Supradicta diligens observatio, in ordinandis testamentis, militibus propter nimiam imperitiam constitutionibus principalibus remissa est; nam quamvis ii neque legitimum numerum testium adhibuerint neque aliam testamentorum solemnitatem observaverint, recte nihilominus testantur: videlicet, cum in expeditionibus occupati sunt, quod merito nostra constitutio introduxit. Quoquo enim modo voluntas ejus suprema inveniatur, sive scripta sive sine scriptura, valet testamentum ex voluntate ejus. Illis autem temporibus, per quæ citra expeditionem necessitatem in aliis locis vel suis ædibus degunt, minime ad vindicandum tale privilegium adjunguntur.*"

"1. Plane de testamentis militum Trajanus Statilio Severo ita rescripsit: '*Id privilegium quod militantibus datum est, ut quoquo modo facta ab iis testamenta rata sint, sic intelligi debet, ut utique prius constare debeat testamentum factum esse, quod et sine scriptura a non militibus quoque fieri potest. Is ergo miles de cujus bonis apud te quæritur, si convocatis ad hoc hominibus ut voluntatem suam testaretur, ita locutus est ut declararet quem vellet sibi heredem esse, et cui libertatem tribuere, potest videri sine scripto hoc modo esse testatus, et voluntas ejus rata habenda est. Ceterum, si (ut plerumque sermonibus fieri solet) dixit alicui, Ego te heredem facio, aut bona mea tibi relinquo, non oportet hoc pro testamento observari: nec ullorum magis interest quam ipsorum quibus id privilegium datum est, ejusmodi*"

“exemplum non admitti; alioquin non difficulter post
 “mortem alicujus militis testes existerent, qui affirmarent
 “se audisse dicentem aliquem relinquere se bona cui visum
 “sit, et per hoc vera judicia subverterentur.’”

“3. Sed haecenus hoc illis a principalibus constitutioni-
 “bus conceditur, quatenus militant et in castris degunt.
 “Post missionem vero veterani, vel extra castra alii si
 “faciant adhuc militantes testamentum, communi omnium
 “civium Romanorum jure facere debent.

“4. Sed et si quis ante militiam non jure fecit testa-
 “mentum, et miles factus et in expeditione degens resig-
 “navit illud et quædam adjecit sive detraxit, vel alias
 “manifesta est militis voluntas hoc valere volentis, dicen-
 “dum est valere hoc testamentum quasi ex nova militis
 “voluntate.”

The following points have been decided on military wills.

A surgeon in the East India Company's service was held to come within the term of “a soldier,” as used in the statutes. *In the goods of Donaldson*, 2 Curt. 386. The will of an officer in India, who had been attached to a regiment engaged in actual military service, and had been ordered to leave that regiment and rejoin his own, which was also engaged at the time in the same part of India in actual military service, made on the day of his death whilst on his way to rejoin his own regiment, was admitted to probate as a will made during actual military service. *Herbert v. Herbert*, Deane & Swabey, 10.

The will of an officer, who was in June, 1863, ordered from Jamaica with a detachment of his regiment to reinforce her Majesty's troops on the Gold Coast, Africa, where there were disputes going on between England and the King of Ashantee, and made after he had joined an expedition on the Gold Coast formed to march into the interior, and in contemplation of such march, was admitted to probate as a military will. *In the goods of Thorne*, 4 S. & T. 36; 34 L. J. 131.

But a will made by an officer whilst engaged on a tour

of inspection in India, was held not to be entitled to probate as a military will. *In the goods of Major General Hill*, 1 Roberts. 276.

So also was a will made by an officer in India under orders to proceed from his own station in one presidency to take part in a war going on in another presidency, two days before he commenced the march. *Borles v. Jackson*, 1 Spink's Eccl. & Adm. Rep. 294.

The right of making a privileged will, which was by the Roman law confined to soldiers, is by our law extended to sailors when at sea, and whether they are employed in the Royal Navy or in the merchant service. Privilege extended to all sailors on a voyage.

A purser of a man of war comes within the term seaman. *In the goods of Hayes*, 2 Curt. 338. So also does a surgeon in the navy. *In the goods of Saunders*, 1 L. R. 16; 35 L. J. 26.

What constitutes "*being at sea*" within the 11th section of the Wills Act has been under consideration in several reported cases; the leading case is that of *In the goods of M'Murdo*, 1 L. R. 540; 37 L. J. 14, in which the application was to revoke a probate which had been granted of an informal will as having been made by a mariner at sea, the deceased being at the time when the will was made a mate on board her Majesty's ship The Excellent, and the will having been made on The Excellent when she was laid up in Portsmouth harbour, and when there was no immediate intention of sending her to sea. Lord Penzance, in refusing the application, said, "A will made under these circumstances, in my opinion, comes within the description of the will of a mariner or seaman being at sea. I see a great distinction between this case and that of *In the goods of Corby*, 1 Ecc. & Adm. 292, where the deceased wrote a letter of which probate was sought, stating that he had shipped on board a vessel lying in Melbourne harbour at the date of the letter. It did not appear whether the letter was written before or after he went on board, and

“ the expressions which he used may have meant nothing
 “ more than that he had signed ship’s articles, and had
 “ bound himself to join the vessel at a certain date. The
 “ cases appear to me to go this length, that where a man
 “ has joined a vessel on service and has commenced a
 “ voyage in it, a will made in the course of that voyage
 “ will be within the exception in the act, even although
 “ such will was in fact made on shore. That was the case
 “ *In the goods of Lay*, 2 Curt. 375. The *Calliope* was
 “ lying in the harbour of Buenos Ayres, but whether she
 “ had gone there to refit, or for provisions, or for some
 “ other temporary purpose, or whether she was stationed
 “ there, does not appear. But she was actually in the
 “ harbour at the time of the making of the will, and the
 “ will was in fact made on shore. In the case of *Admiral*
 “ *Austen*, 2 Roberts. 611, the will was made whilst the
 “ admiral was engaged on an expedition up a river, when,
 “ although he was not actually at sea, he was practically
 “ on maritime service, which he had commenced by going
 “ to sea. It seems to me impossible to draw a distinction
 “ for this purpose between *The Calliope* lying in Buenos
 “ Ayres harbour and *The Excellent* lying in Portsmouth
 “ harbour. Although a seaman on board *The Excellent* is
 “ not in a foreign country, still he is subject to the re-
 “ straints of the service, and might have no opportunity of
 “ making a will with the usual formalities if he was taken
 “ ill on board when no lawyer was at hand. See also *In*
 “ *the goods of Parker, deceased*, 2 S. & T. 375; 28 L. J. 91.”

Probate
 granted of a
 lost will.

Where a will has been destroyed in the testator’s life, either by himself unintentionally, or by any other person without his directions, or with his direction but not in his presence, or where a will has been destroyed after the testator’s death or cannot be found, or where its disappearance is presumably attributable to accident, a copy or a draft of the contents or the substance of the will may be propounded and established as the will of the deceased, and probate will be decreed to issue of such copy, draft or

substance until the original will or a more authentic copy thereof be brought into and left in the registry.

Where the Court has not before it all the contents of a lost will, probate will be granted of its contents in so far as they are proved. *Sugden and others v. Lord St. Leonards*, 1 P. Div. 154, 230; 45 L. J. 49.

Probate of part of the contents of a lost will.

Where the draft or an authenticated copy of a will is propounded, the practice is to refer to and identify in the statement of claim the draft or copy annexed to the affidavit of scripts as containing the contents of the will executed by the testator. Where there is no draft or copy forthcoming, the contents or substance of the will should be set forth in the statement of claim. For form, see the declaration in *Sugden v. Lord St. Leonards*, 1 P. Div. 154—158; 45 L. J. 49.

Statement of claim propounding a lost will.

A statement of claim propounding a lost will should allege—

1. The due execution of the will, with its date, and the name, residence, description and date and place of death of the testator.

2. The capacity of the testator at the date of the will.

3. That the said will never was revoked or destroyed by the testator, nor by any person in his presence and by his direction with the intention of revoking the same, and the same was at the time of his death a valid and subsisting will, but the same cannot be found.

4. That the contents of the said will were in substance or to the effect as follows, “This is the last will and testament of me, &c.”—setting out the contents and substance as far as they are capable of proof.

A testamentary paper, although unexecuted, may be entitled to probate by reason of its being incorporated in a duly executed one. Thus where a testamentary paper duly executed refers to an existing unexecuted document as embodying some of the testator’s testamentary wishes in such terms that the document may be ascertained, the unexecuted paper is held to be incorporated in the duly

Doctrine of incorporation.

executed one, and will be included in the probate. See *Van Straubenzee v. Monck*, 3 S. & T. 12; 32 L. J. 21.

The leading case on the doctrine of incorporation is that of *Allen v. Muddlock*, 11 Moore's P. C. 427, where the law on this subject is thus laid down in the judgment delivered by Lord Kingsdown,—“A reference in a will may be in “such terms as to exclude parol testimony, as where it is “to papers not yet written, or where the description is so “vague as to be incapable of being applied to any instru- “ment in particular; but the authorities seem clearly to es- “tablish that where there is a reference to any written docu- “ment, described as then existing, in such terms that it is “capable of being ascertained, parol evidence is admissible “to ascertain it, and the only question then is whether the “evidence is sufficient for the purpose. (Ib. 454.) And “when the parol evidence sufficiently proves that, in the “existing circumstances, there is no doubt as to the instru- “ment, it is no objection to it that, by possibility, circum- “stances might have existed in which the instrument “referred to could not have been identified.” (Ib. 461.)

It was decided in *Croker v. The Marquis of Hertford*, 4 Moore, P. C. 339, “That where a testator having made “and duly executed various codicils, made a codicil which “was signed, but not duly attested, and by a subsequent “duly executed codicil, ratified and confirmed his said “will and codicils, such general reference was not sufficient “to identify, and so incorporate the unexecuted codicil in “that of the duly executed one.”

Where incorporation is relied upon, the statement of claim should refer specifically to the documents said to be incorporated, as well as to the incorporating parts of the duly executed instrument.

Obliterations,
erasures,
interlinea-
tions or other
alterations.

Where obliterations or erasures, interlineations or other alterations, are apparent on the face of the will, the question arises as to whether effect shall or shall not be given to them in the probate.

Sect. 21,
Wills Act.

Sect. 21 of the Wills Act, 1 Vict. c. 26, provides, “That

“no obliteration, interlineation, or other alteration made
 “in any will after the execution thereof, shall be valid or
 “have any effect, except so far as the words or effect of
 “the will before such alteration shall not be apparent,
 “unless such alteration shall be executed in like manner
 “as hereinbefore is required for the execution of the will;
 “but the will, with such alteration as part thereof, shall
 “be deemed to be duly executed if the signature of the
 “testator, and the subscription of the witnesses, be made
 “in the margin, or on some other part of the will opposite
 “or near to such alteration, or at the foot or end of or
 “opposite to a memorandum referring to such alteration,
 “and written at the end or some other part of the will.”

Obliterations,
 erasures,
 interlinea-
 tions, or other
 alterations.

The following rules in the common form practice relate exclusively to erasures and obliterations:—“Erasures and
 “obliterations are not to prevail unless proved to have
 “existed in the will at the time of its execution, or unless
 “the alterations thereby effected in the will are duly
 “executed and attested: or unless they have been rendered
 “valid by the re-execution of the will, or by the subse-
 “quent execution of a codicil thereto. If no satisfactory
 “evidence can be adduced as to the time when such
 “erasures and obliterations were made, and the words
 “erased or obliterated be not entirely effaced, but can
 “upon inspection of the paper be ascertained, they must
 “form part of the probate.” R. 10, N.-C. B.

“In every case of words having been erased or oblite-
 “rated which might have been of importance, an affidavit
 “is required.” R. 11, N.-C. B.

Where any words in a will have been so obliterated or
 erased by the testator as to be intelligible without or with
 the assistance of a magnifying glass, they will be inserted in
 the probate, unless they are shown to have been duly re-
 voked in one of the ways provided in the statute; but where
 they are unintelligible even with the assistance of a glass,
 probate will pass in blank of the words obliterated or
 erased, provided the Court be of opinion that the obliteration

Obliterations
 or erasures.

tion or erasure was made *animo revocandi*. *Townley v. Watson*, 3 Curt. 769.

Where bequests have been obliterated or erased with the intention of substituting for them other bequests, and such substituted bequests fail to take effect in consequence of the defective execution of the alteration, probate will be decreed of the will in its original form, on the ground that the obliteration or erasure was made for the purpose of revocation conditioned only on the substituted bequest taking effect. *Brooke v. Kent*, 3 Moore, P. C. 334.

Where a will had been duly executed, and the name of one of the attesting witnesses had been subsequently erased by the testator to be rewritten by the witness, and not with the intention of revoking the will, probate was granted of the will as originally executed. *In the goods of Coleman*, 2 S. & T. 314; 30 L. J. 170.

Practice as to
interlinea-
tions and
other altera-
tions.

The following rules in the common form practice relate to interlineations or other alterations in wills: "Inter-
" lineations and alterations are invalid, unless they existed
" in the will at the time of its execution, or, if made
" afterwards, unless they have been executed and attested
" in the mode required by the statute, or unless they have
" been rendered valid by the re-execution of the will, or
" by the subsequent execution of a codicil thereto." R. 8, N.-C. B.

" When interlineations or alterations appear in the will
" (unless duly executed or recited in, or otherwise identified
" by, the attestation clause), an affidavit or affidavits in
" proof of their having existed in the will before its execu-
" tion must be filed, except when the alterations are merely
" verbal, or when they are of but small importance, and
" are evidenced by the initials of the attesting witnesses." R. 9, N.-C. B.

Presumption
of law as to
time of
making of
alterations.

The presumption of law is that in the absence of all direct evidence as to the date when the alterations, interlineations or erasures were made, that they were made after the execution of the will. *Cooper v. Bockett*, 4

Moore's P. C. 419. But the mere circumstance of the amount of a legacy, or of the name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation or other alteration within the meaning of section 21 of the Wills Act. *Greville v. Tylee*, 7 Moore's P. C. 327.

Interlineations or other alterations appearing on the face of a will executed prior to January 1st, 1838, the day on which the Wills Act (1 Vict. c. 26) came into operation, are, in the absence of evidence to the contrary, presumed to have been made before the Act came into operation, and will therefore be entitled to probate. *In the goods of Streaker*, 4 S. & T. 192; 28 L. J. 50.

Where there appears upon the face of the will propounded an erasure, obliteration, interlineation, or other alteration, a reference to such erasure, obliteration, interlineation, or other alteration should be made in the statement of claim, and the party propounding the will should state whether he claims probate of it in its original or in its altered state.

Form of statement of claim in cases of erasures, &c.

III. The 3rd paragraph of the statement of claim in a probate suit pleads the testamentary capacity of the testator at the date of the will. The onus of establishing that the testator had testamentary capacity at the time when he executed the will propounded is on the party propounding it, and even where there is no opposition to the will, he must produce some evidence of testamentary capacity at the time of its execution to entitle him to a decree of probate in solemn form.

Testamentary capacity.

The question what constitutes testamentary capacity will be considered under the head of Statement of Defence.

ADMINISTRATION ACTIONS.

Administration actions are for the most part instituted for the purpose of establishing the plaintiff's title to a

Administration actions.

T.

L.

“ said, a widower, without child, parent, brother or sister,
 “ uncle or aunt, nephew or niece.

“ 2. The plaintiff is the cousin-german, and one of the
 “ next of kin of the deceased.

“ The plaintiff claims :—

“ That the Court decree to him a grant of letters of
 “ administration of the personal estate and effects
 “ of the said deceased as his lawful cousin-german,
 “ and one of his next of kin.”

ACTIONS FOR THE REVOCATION OF PROBATE OR OF LETTERS OF ADMINISTRATION.

The nature and object of actions for the revocation of probate or of letters of administration have already been briefly described. (See ante, p. 70.)

In an action for the revocation of a probate granted in common form, the statement of claim should state—
 (1.) The name, description and residence of the testator, and the date and place of his death. (2.) The fact that probate in common form had been granted (with the date of the probate) of an alleged will of the testator (with the date of the will) to the defendant in the principal or in a district probate registry of the High Court, and that such probate ought to be revoked. (3.) As one of the objects of the action is to obtain the revocation of probate, the grounds upon which the revocation of the grant is sought should appear, according to a decision of the president in chambers, in the statement of claim, either that the will proved was not entitled to probate on the grounds of its having been unduly executed, of the incapacity of the deceased at the time of its execution, by reason of its execution having been obtained by undue influence, &c. Where the will is abandoned by the defendant the practice of the plaintiff setting forth in his statement of claim the grounds upon which its validity is impeached is convenient as entitling him to produce evidence at the hearing impeaching its validity, and the Court if satisfied with

Actions for the revocation of probate or of letters of administration.

Contents of statement of claim for a revocation of probate.

such evidence will then be in a position to pronounce against the will.

Contents of
statement of
claim for
revocation of
letters of ad-
ministration.

In an action for the revocation of a grant of letters of administration, the statement of claim should state—(1.) The name, description, address, and date and place of the death of the deceased. (2.) The fact of a grant of letters of administration having issued to the defendant from the principal probate or a district probate registry with the date of the grant. (3.) The ground on which the revocation of the grant is claimed either that the defendant was not entitled to the grant as not being interested in the estate of the deceased either as next of kin or otherwise, and that the plaintiff is interested in the estate as next of kin or otherwise, or that the deceased had died testate, and that the plaintiff had an interest in his estate under his last will, the plaintiff should in the last case propound the will, and claim not only that the Court should révoke the grant of administration, but also should decree probate in solemn form of the will propounded by him.

CHAPTER X.

STATEMENT OF DEFENCE—ORDER XXII.—RULES—FORM OF ORDINARY STATEMENTS OF DEFENCE—UNDUE EXECUTION—FORGERY—EXECUTION BY TESTATOR'S SIGNATURE OR MARK—POSITION OF TESTATOR'S SIGNATURE—WHAT AMOUNTS TO AN ACKNOWLEDGMENT OF TESTATOR'S SIGNATURE IN PRESENCE OF ATTESTING WITNESSES—PRESENCE OF ATTESTING WITNESSES AT TIME OF TESTATOR'S MAKING OR ACKNOWLEDGING HIS SIGNATURE—SUBSCRIPTION OF WITNESSES—TESTAMENTARY CAPACITY—IDIOTS—LUNATICS—GENERAL INSANITY—PARTIAL INSANITY—DELUSIONS—WARING *v.* WARING—BANKS *v.* GOODFELLOW—ONUS PROBANDI WHERE INSANITY HAS BEEN ONCE ESTABLISHED—INCAPACITY FROM OLD AGE OR ILLNESS OR DRUNKENNESS—UNDUE INFLUENCE—DURESS—FRAUD—KNOWLEDGE AND APPROVAL OF CONTENTS OF WILL—A SHAM WILL—REVOCATIONS OF WILLS—BY MARRIAGE, BY SUBSEQUENT TESTAMENTARY PAPER, BY BURNING, TEARING, OR OTHERWISE DESTROYING THE WILL—WILL IN TESTATOR'S CUSTODY NOT FORTHCOMING ON HIS DEATH—PRESUMPTION AS TO REVOCATION—CODICIL NOT REVOKED BY REVOCATION OF WILL—DUPLICATE WILLS—ANIMUS REVOCANDI—DEPENDENT RELATIVE REVOCATION.

ORDER XXII.

Defence.

“Where a statement of claim is delivered to a defendant he shall deliver his defence within eight days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a judge.” R. 1.

“Where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.” R. 4.

“Where a defendant by his defence sets up any counter-claim which raises questions between himself and the

“ plaintiff along with any other person or persons, he shall
“ add to the title of his defence a further title similar to
“ the title in a statement of complaint, setting forth the
“ names of all the persons who, if such counter-claim were
“ to be enforced by cross action, would be defendants to
“ such cross action, and shall deliver his defence to such of
“ them as are parties to the action within the period within
“ which he is required to deliver it to the plaintiff.” R. 5 (a).

“ Where any such person as in the last preceding rule
“ mentioned is not a party to the action, he shall be
“ summoned to appear by being served with a copy of
“ the defence, and such service shall be regulated by the
“ same rules as are hereinbefore contained with respect to
“ the service of a writ of summons, and every defence so
“ served shall be indorsed in the Form No. 4 in Appen-
“ dix (B.) hereto, or to the like effect.” R. 6.

Form 4.

“ To the within-named X. Y.

“ Take notice that if you do not appear to the within
“ counter-claim of the within-named C. D. within eight
“ days from the service of this defence and counter-claim
“ upon you, you will be liable to have judgment given
“ against you in your absence.

“ Appearances are to be entered at the Central Office,
“ Royal Courts of Justice.

“ Any person not a defendant to the action, who is
“ served with a defence and counter-claim as aforesaid,
“ must appear thereto as if he had been served with a writ
“ of summons to appear in an action.” R. 7.

“ Any person named in a defence as a party to a counter-
“ claim thereby made may deliver a reply within the
“ time within which he might deliver a defence if it were a
“ statement of claim.” R. 8.

“ Where a defendant by his statement of defence sets

(a) The practice of the Probate Division is to summons parties interested in a counter-claim by citation.

“ up a counter-claim, if the plaintiff or any other person
 “ named in manner aforesaid as party to such counter-
 “ claim contends that the claim thereby raised ought not
 “ to be disposed of by way of counter-claim, but in an
 “ independent action, he may at any time before reply
 “ apply to the Court or a judge for an order that such
 “ counter-claim may be excluded, and the Court or a judge
 “ may, on the hearing of such application, make such order
 “ as shall be just.” R. 9.

“ In probate actions the party opposing a will may,
 “ with his defence, give notice to the party setting up the
 “ will that he merely insists upon the will being proved in
 “ solemn form of law, and only intends to cross-examine
 “ the witnesses produced in support of the will, and he shall
 “ thereupon be at liberty to do so, and shall be subject to
 “ the same liabilities in respect of costs as he would have
 “ been under similar circumstances according to the prac-
 “ tice of the Court of Probate.” R. 11.

“ In the High Court of Justice,

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Statement of defence delivered by A. B., of ,
 “ solicitor for C. D., the defendant.

“ The defendant says as follows :—

“ 1. The said will and codicil of the said deceased were
 “ not duly executed according to the provisions of the
 “ statute 1 Vict. c. 26.

“ 2. The deceased at the time the said will and codicil
 “ respectively purport to have been executed was not of
 “ sound mind, memory and understanding.

“ 3. The execution of the said will and codicil was
 “ obtained by the undue influence of the plaintiff [and
 “ others acting with him whose names are at present
 “ unknown to the defendant].

“ 4. The execution of the said will and codicil was
 “ obtained by the fraud of the plaintiff, such fraud, so far

“ as is within the defendant’s present knowledge being
 “ [*state the nature of the fraud*].

“ 5. The said deceased at the time of the execution of
 “ the said will and codicil did not know and approve of
 “ the contents thereof, or of the contents of the residuary
 “ clause in the said will [*as the case may be*].

“ 6. The deceased made his true last will dated the 1st
 “ of January, 1873, and in the said will appointed the
 “ defendant sole executor thereof. [Propound this will as
 “ in paragraphs 2 & 3 of statement of claim.]

“ The defendant claims :—

“ 1. That the Court pronounce against the said will and
 “ codicil propounded by the plaintiff.

“ 2. That the Court decree probate of the said will of the
 “ deceased dated the 1st of January, 1873, in solemn form
 “ of law.”

Defence—
 Undue execu-
 tion.

The onus of proving that the will propounded was
 executed as required by law is on the plaintiff. If re-
 quired to be executed in accordance with the provisions of
 the 9th section of the Wills Act it should appear.

(1.) That on the face of the paper what purports to be
 the signature or mark of the testator is placed at the end
 of the will, or so placed as to come within the requirements
 of Lord St. Leonards Act, 15 & 16 Vict. c. 24, s. 1.

(2.) That such signature or mark was made by the
 testator himself, or by some one for him in his presence
 and by his direction. (3.) That it was either so made
 or was acknowledged by the testator as his signature in
 the presence of two witnesses present at the same time.

(4.) That each of these two witnesses subsequently to the
 making or acknowledgment of the testator’s signature sub-
 scribed the will in the presence of the testator. All the
 above questions are raised by the plea of undue execution,
 including the charge that the signature or mark of the
 testator is a forgery. But where it is intended to set up
 a case of forgery, it is convenient with a view to prevent
 an adjournment at the hearing on the ground of surprise

Forgery.

either in the statement of defence or by written notice to make the charge of forgery.

The testator's signature to a will as required by the Wills Act may be made by the testator himself signing his own name, or by his signing under an assumed name, the assumed name being regarded as his mark. *In the goods of Glover*, 5 N. of C. 553; *In the goods of Redding*, 2 Roberts. 339. Or by his making a mark, and then it is usual to place the testator's name against the mark. But a will signed by a mark is entitled to probate, although the name of the testator is not placed against the mark, provided it be identified as the will of the testator. *In the goods of Bryce*, 2 Curt. 325.

Execution by testator's signature.

Execution by testator's mark.

The placing of a wrong name (her maiden name) against the mark of a testatrix instead of her real name, where the will was in the commencement described as the will of the testatrix by her real name, has been held not to vitiate the mark. *In the goods of Clarke*, 1 S. & T. 23; 27 L. J. 18.

Wrong name placed against testatrix's mark.

The mark may be made either by a pen or by some other instrument. Thus, where the testator was in the habit of using a stamp with his name engraved on it to impress his signature to letters, and one of the attesting witnesses with this stamp impressed by the testator's directions and in his presence his name at the end of a codicil, this was held to be a good execution by a mark. *Jenkins v. Gaisford and Thring*, 3 S. & T. 93; 32 L. J. 122.

Mark may be made either by a pen or other instrument.

When a person signs for a testator by his directions, he may sign either the testator's name or his own name for the purpose of giving effect to such directions. *In the goods of Clarke*, 2 Curt. 329.

Signature made by another person by testator's directions.

The testator's signature may be made by one of the attesting witnesses. *In the goods of Bailey*, 1 Curt. 914; *Smith v. Harris*, 1 Roberts. 262.

As to the position of the testator's signature it has been held, where the only signature of the testator was in the attestation clause, which as well as the will was in his handwriting, and he asked the subscribing witnesses to

Position of testator's signature in attestation clause.

attest his will, the execution was valid under 1 Vict. c. 26. *In the goods of Huckvale*, 1 L. R. 375; 36 L. J. 84; *In the goods of Pearn*, 1 P. Div. 70; 45 L. J. 31. See also *In the goods of Walker*, 2 S. & T. 354; 31 L. J. 62; *In the goods of Casmore*, 1 L. R. 653; 38 L. J. 54.

Where, from the obvious sequence and sense of the context, the signature of the deceased really followed the dispositive part of the testamentary paper, though it occupied a place on the paper literally above it, probate of such paper was decreed. *In the goods of Kimpton*, 3 S. & T. 427; 33 L. J. 153. So, also, where the testator's signature was written partly across the last line but one of the will, and entirely above the last line, with the exception of one letter which touched the last line, probate was decreed of the paper. *In the goods of Woodley*, 3 S. & T. 429; 33 L. J. 154.

Where a testator signed his name at the end of several dispositive clauses in a will apparently written at different times, the presumption is that he intended to give effect to the whole of what was written at the time he last made his signature. *In the goods of Cottrell*, 3 S. & T. 419; 33 L. J. 106.

Where the signature of the testator and of the attesting witnesses was made, not on the paper on which the will was written, but on a piece of paper attached to it by being pasted, this was held to be a good execution within 15 & 16 Vict. c. 24, s. 1. "The signature being so placed " at the end of the will that it is apparent on the face of " it, that the testator intended thereby to give effect to the " writing signed as his will." *Cook v. Lambert*, 3 S. & T. 46; 32 L. J. 93; *In the goods of Gausden*, 2 S. & T. 362; 31 L. J. 53.

WHAT CONSTITUTES A SUFFICIENT ACKNOWLEDGMENT.

An acknowledgment of the testator's signature may be made expressly by words, or by implication—*e. g.*, by the testator producing the will with his signature visibly apparent on the face of it to the witnesses, and requesting

What
amounts to
acknowledg-
ment of
testator's
signature in

them to subscribe it. *Gaze v. Gaze*, 3 Curt. 451; *Blake v. Knight*, ib. 547; *Ilott v. Genge*, 3 Curt. 172, 175; by gestures, *In the goods of Davis*, 2 Roberts. 337; *In the goods of Jones*, Deane & Swab. 3; by the testator's apparent assent to a request made by another person in his presence to the witnesses to subscribe the will, his signature being visible to the witnesses. *Faulds v. Jackson*, 6 N. of C. Supp. 1; *Inglesant v. Inglesant*, 3 L. R. 172; 43 L. J. 43.

the presence
of attesting
witnesses.

Where a testator signed his will in the presence of the attesting witnesses, who saw him in the act of writing on the paper containing the will, which the Court presumed to be his signature, and then by his request subscribed their names to the paper, the attestation was held to be good, although they did not know he was executing a will, and did not see the signature, and he did not acknowledge it. *Smith v. Smith*, 1 L. R. 143; 35 L. J. 65.

Where the witnesses are unable to see the testator's signature, and he merely requests them to sign without giving them any explanation of the nature of the instrument they are signing, there is not a sufficient acknowledgment. *Ilott v. Genge*, 3 Curt. 160; 4 Moo. P. C. 265; *Fischer v. Popham*, 3 L. R. 246; 44 L. J. 47.

But where the testator produces a paper, and gives the witnesses to understand that it is his will, and asks them to attest it, this amounts, although they did not see his signature, to an acknowledgment of it, provided the Court is satisfied that the signature was there at the time. The leading case on this point is *Beckett v. Howe*, 2 L. R. 1; 39 L. J. 1; in which Lord Penzance delivered the following judgment:

“The Court took time in this case, in order to consider
“the former decisions, and to see whether any case already
“decided in any way qualified the doctrine propounded
“in *Guillim v. Guillim*, 3 Sw. & Tr. 200; 29 L. J. 31.
“The question for my decision is, whether the will in this
“case was properly executed. The facts are these. A
“few days before the will was executed, the testator said

Beckett v.
Howe, 2 L.
R. 1.

“ to one of the intended witnesses he wished him to come
“ and witness his will ; to the other, likewise, he said he
“ wanted him to sign a paper, but did not mention what
“ paper. In accordance with an arrangement one evening,
“ at the appointed hour, the parties met. Both the wit-
“ nesses having arrived, the testator produced a paper
“ carefully folded up, so that the witnesses could not see
“ what was written upon it. He made the remark in the
“ hearing of both that the death of his wife necessitated
“ an alteration in his affairs ; and then he asked the
“ witnesses to sign their names, which they did. The
“ sum and substance is, that the witnesses did not see the
“ testator’s signature, nor did the testator say it was there,
“ but he did tell one witness that he was going to execute
“ a will, and indirectly to both he expressed that intention,
“ for he told them that some alteration was necessary in
“ his affairs by reason of his wife’s death. The doctrine
“ in *Gwillim v. Gwillim*, 3 Sw. & Tr. 200 ; 29 L. J. 31, is
“ this, that if the testator produces a paper, and gives the
“ witnesses to understand it is his will, and gets them to
“ sign their names, that amounts to an acknowledgment
“ of his signature, if the Court is satisfied that the signa-
“ ture of the testator was on the will at the time. Whether
“ that decision was right or wrong, I have not to deter-
“ mine. It was founded on other cases. Provided the
“ testator acknowledges the paper to be his will, and
“ his signature is there at the time, it is sufficient. I
“ think the circumstances in this case come up to the
“ requirements laid down in *Gwillim v. Gwillim*. What
“ the testator said was tantamount to saying this is my
“ will, and I am satisfied that the signature was there at
“ the time. It may be asked, what evidence is there that
“ the signature was there ? If direct evidence be required,
“ there is none in the case ; but the Court may judge from
“ the appearance of the paper, and the circumstances of
“ the case generally ; and on this head there was quite as
“ much evidence as in *Gwillim v. Gwillim*. In that case

“Sir C. Cresswell said: ‘If it were necessary to have
 “‘direct evidence that the name of the testator was on
 “‘the will, when he acknowledged it by asking them to
 “‘witness his will, the proof of the execution would fail;
 “‘but that certainty is not necessary. . . . I am, therefore,
 “‘at liberty to judge from the circumstances of this case,
 “‘whether the name of the testator was on the will at the
 “‘time of the attestation or not. It is hardly likely that
 “‘this testator, who knew that there must be two witnesses
 “‘to the will, did not know that he must sign it before
 “‘they did, and either sign it or acknowledge it in their
 “‘presence.’ Word for word, these observations apply to
 “the present case. The testator himself wrote an attestation
 “clause, which, although not in the ordinary terms, clearly
 “shows that the testator knew what forms are required
 “in executing a will. Sir C. Cresswell concludes thus:
 “‘I cannot, therefore, but think that the name of the
 “‘testator was written at that time, and that by asking
 “‘these old ladies to witness his will he did acknowledge
 “‘his signature.’ I think this will was duly executed,
 “and I decree probate of it.”

It is necessary that the signature of the testator should be made or acknowledged in the joint presence of the attesting witnesses, and that the witnesses should attest in the presence of the testator, although not of each other. *Faulds v. Jackson*, 6 Notes of Cases, Supp. 1.

Both witnesses must attest and subscribe after the testator's signature has been made or acknowledged to them, when both were present at the same time (*Cooper v. Bockett*, 4 Moore's P. C. 419; *Hindmarsh v. Charlton*, 8 H. of L. 167), and such subscription must be made in the presence of the testator.

What constitutes the presence of the testator has been the subject of some discussion; and the result of the cases is, that it is sufficient for the witnesses to sign in such a place and in such a position that the testator might have seen them sign if he had chosen to look; but if he could

Presence of attesting witnesses at time of the making or acknowledgment of testator's signature.

What constitutes a valid subscription of an attesting witness.

not see them sign had he looked, the attestation would be bad. *In the goods of Colman*, 3 Curt. 118.

No form of attestation is necessary; but to make a valid subscription and attestation, either the name of the witness, or some mark or name intended to represent his name, must be written or made by him in the presence of the testator. Thus, a witness having signed simply as servant to Mr. Sperling (the testator), having been told by the testator's solicitor to sign as servant to Mr. Sperling, was held to be a good attestation. *In the goods of Sperling*, 3 S. & T. 272; 33 L. J. 25; see also *Hindmarsh v. Charlton*, 8 H. of L. 160; 1 S. & T. 433. The correction of an error in the name of the witness, or his acknowledgment of his name, or the adding a date to the will, would not be a good subscription. *In the goods of Maddock*, 3 L. R. 169; 43 L. J. 29; *Hindmarsh v. Charlton*, 8 H. of L. 160.

Position of
subscription
of attesting
witnesses.

The Wills Act does not require the attesting witnesses to subscribe their names on any particular part of the instrument; what is required is, that the signatures should be on the face of the instrument, and that it should appear that they were meant to attest the signature of the testator. *In the goods of Davis*, 3 Curt. 748; *In the goods of Chamney*, 1 Roberts. 757; see also *Roberts v. Phillips*, 4 E. & B. 450, upon the language of the Statute of Frauds, in which the same words are used with regard to the will being attested and subscribed as in the Wills Act. But where there are two testamentary instruments on the same sheet of paper, the subscription of the witnesses at the end of the first instrument was held not to be a good subscription for the second paper. *In the goods of Taylor*, 2 Roberts. 411.

Where the deceased signed his name at the end of his will on the tenth sheet, and placed his initials on the first nine sheets, and two out of the three witnesses signed their names only on the first nine sheets, it was held that the testator's signature was not duly attested. *Phipps and Biddell v. Hall*, 3 L. R. 166.

A signature
subscribed at

Where a will was executed in the presence of two wit-

nesses, and was subscribed by them, and also by a third person who was a residuary legatee, the Court received evidence to account for the signature of the third party, and, being satisfied that it was not written for the purpose of attesting the signature of the deceased, it ordered it to be excluded from the probate. *In the goods of Sharman*, 1 L. R. 661; 38 L. J. 47.

the end of a will, but not for the purpose of attesting the testator's signature, may be excluded from the probate.

Where a will had been duly executed, and many years afterwards the testatrix handed over the will with her title deeds to the residuary legatee and executor (her nephew), and re-signed the will herself; and her nephew and another person, by her request, signed their names as witnesses to the transaction of the delivery of the will, the nephew signing as executor: the Court held this not to be a re-execution, and excluded the second set of signatures from the probate. *Dunn v. Dunn*, 1 L. R. 277.

But where a witness subscribed a will by the testator's request, in the double character of executor and attesting witness, this was held to be a good attestation. *Griffiths v. Griffiths*, 2 L. R. 300; 41 L. J. 14.

Where a will appears to be duly executed, and there is a complete attestation clause, the presumption *omnia ritè esse acta* applies, and is not rebutted by the defective memory of an attesting witness. Where the attestation clause is incomplete, the presumption also applies, but with less force. Where the attestation clause to a will was informal, and the memory of the attesting witness was defective, but it was proved that the will was signed by the deceased, and that the witness had been in the room with him for the purpose of attesting it, the presumption *omnia ritè esse acta* was held to prevail, and the Court pronounced for the will. *Vinnicomble v. Butler and another*, 3 S. & T. 580; 34 L. J. 18.

TESTAMENTARY CAPACITY.

The onus of proving that the deceased had testamentary capacity at the time of the execution of the will, is on the Testamentary capacity.

party relying upon the will, "and the decree of the Court must be against its validity, unless the evidence, on the whole, is sufficient to establish affirmatively that the testator was of sound mind when he executed it." *Symes v. Green*, 1 S. & T. 402; 28 L. J. 83; *Sutton v. Sadler*, 3 E. & B. (N. S.) 87.

Amount of soundness of mind required for making a will.

On the question as to what amount of soundness of mind is required for making a will, Sir James Hannen, in *Burdett and another v. Thompson* (3 L. R. 72, note), says: "The question of unsoundness of mind is one of degree, and it is impossible to lay down any abstract proposition of law which will guide you in determining it. Probably the mind of no person can be said to be perfectly sound, just as the body of no person can be said to be perfectly sound. The question is—Whether there was such a degree of unsoundness of mind as to interfere with those faculties which ought to be brought into action in making a will. If you are at liberty to draw distinctions between various degrees of soundness of mind, then, whatever is the highest degree of soundness is required to make a will. From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature, or through other circumstances, may be supposed to have claims upon the testator's bounty, and the power of considering these several claims, and of determining in what proportions the property shall be divided amongst the claimants; and, therefore, whatever degrees there may be of soundness of mind, the highest degree must be required for making a will."

Four classes of persons incapacitated from making a will.

There are four classes of persons who are incapacitated from making a valid will by reason of mental unsoundness:—1. Idiots; 2. Lunatics; 3. Persons who are unsound through visitation of God, that is, from sickness, accident, or old age; 4. Persons who are unsound through their own acts, namely, drunkenness.

1. An idiot is a person whose mind has been continuously unsound from his infancy. 1. Idiots.

2. A lunatic is a person who is usually insane, but may have lucid intervals, and, during such lucid intervals, he is competent to make a will. 2. Lunatics.

In the books and cases insanity is divided into two kinds, general insanity, and partial insanity.

General insanity exists where the mind is unsound on multifarious matters, so as to indicate that it is diseased throughout. General insanity.

Partial insanity exists in the case of a monomaniac who has insane delusions, limited to a particular subject, or to particular subjects. Partial insanity.

A person whose mind is generally unsound is held to be incapable of making a valid will whilst such unsoundness continues.

A person whose mind is only partially unsound, that is, who is subject to one or more monomanias only, and who does not exhibit indications of his mind being diseased throughout, was held by the Judicial Committee of the Privy Council in *Waring v. Waring* (6 Moore, P. C. 341), during the continuance of such partial unsoundness, to be equally incapable of making a will, with a person generally deranged, on the ground that the mind is one and indivisible, and therefore, if it is unsound on one subject, it is erroneous to suppose that such mind is really sound on other subjects, and that no confidence can be placed in the act of a diseased mind, however rational in appearance, because there is no security that the lurking delusion, the real unsoundness, does not mingle itself with or occasion the act under consideration. *Waring v. Waring*, 6 Moo. P. C. 341.

This doctrine was accepted by Lord Penzance in *Smith v. Tebbett* (1 L. R. 398; 36 L. J. 97). But in a later case (*Banks v. Goodfellow*, L. R., 5 Q. B. 549; 39 L. J., Q. B. 237), its correctness was controverted by the Court of Queen's Bench in the judgment of that Court delivered by Lord Chief Justice Cockburn, in which it was held,

Banks v.
Goodfellow,
 L. R.,
 5 Q. B. 549.

that inasmuch as in both the cases of *Waring v. Waring* and *Smith v. Tebbett*, the delusions of the deceased were multifarious, and of the wildest and most irrational character, abundantly indicating that the mind of the testatrix in either case was diseased throughout, and as in both there was an insane suspicion or dislike of persons who should have been objects of affection, and, what was still more important, as in both it was palpable that the delusions must have influenced the testamentary dispositions impugned, they were cases of general and not of partial insanity, and that the doctrine therefore embraced in the judgments was wholly unnecessary to the particular decisions, and that this being so the question was not concluded by authority.

The Court of Queen's Bench conceded, "That where a delusion has had [as in the case of *Dew v. Clark*, 3 Add. 79, and Haggard's Special Reports], or is calculated to have had, an influence on the testamentary disposition, it must be held to be fatal to its validity. Thus, if, as occurs in a common form of monomania, a man is under a delusion that he is the object of persecution, or attack, and makes a will in which he excludes a child for whom he ought to have provided: though he may not have adverted to that child as one of his supposed enemies, it would be but reasonable to infer that the insane condition had influenced him in the disposal of his property. But where the delusion must be taken neither to have had any influence on the provisions of the will, nor to have been capable of having any, the Court held that such a delusion did not destroy the capacity to make the will, and that a will made under such circumstances should be upheld." *Ib.* 561—570. The President (Sir James Hannen) was a party to this judgment, and adheres to it in the Probate Court.

Definitions of
 delusion.

What constitutes an insane delusion has been the subject of argument and consideration in several cases.

In the leading case of *Dew v. Clark* (3 Add. 79; Haggard's Special Reports), Sir John Nicholl gives the follow-

ing definition of what a delusion is:—"The true criterion, "the true test, of the absence or presence of insanity I take "to be the absence or presence of what, used in a certain "sense of it, is comprisable in a single term, namely, delusion. Wherever the patient once conceives something "extravagant to exist which has still no existence whatever "but in his own heated imagination, and wherever at the "same time, having once so conceived, he is incapable of "being, or at least of being permanently, reasoned out of "that conception, such a patient is said to be under a delusion in a peculiar half technical sense of the term; and "the absence or presence of delusion so understood forms, "in my judgment, the true and only test or criterion of "absent or present insanity. In short, I look upon delusion, in this sense of it, and insanity, to be almost, if not "altogether, convertible terms; so that a patient under a "delusion, so understood, on any subject or subjects in any "degree is, for that reason, essentially mad or insane on "such subject or subjects in that degree."

In *Prinsep v. Dyce Sombre* (10 Moore, P. C. 247), the Judicial Committee say: "We cannot err in saying, that "insane delusions are of two kinds—the belief in things "impossible; the belief in things possible, but so improbable, under the surrounding circumstances, that no man "of sound mind would give them credit: to which we may "add, the carrying to an insane extent impressions not in "their nature irrational."

A repulsion to children, or to persons having natural claims on a testator's bounty, may be so unreasonable as to amount to a delusion and so invalidate a will.

A repulsion to persons having natural claims on a testator's bounty may amount to a delusion.

"A man moved by capricious, frivolous, mean, or even "bad motives, or by taking an unduly harsh view of the "character and conduct of his children, may by will, either "partially or wholly, disinherit them; but there is a limit "beyond which it would cease to be only a harsh unreasonable judgment, and must be held to proceed from some "mental defect, so as to invalidate the will. If such repul-

“ sion, amounting to delusion as to character, is shown to
 “ have existed prior to the execution of the will, it will be
 “ for the party setting up that document to establish that
 “ the delusion was inoperative at the time of its execution ;
 “ and the jury, in determining whether or not the delusion
 “ was operative, will have to regard the contents of the
 “ will and the circumstances surrounding its execution.”
Boughton v. Knight, 3 L. R., pp. 64—66, 69 and 76 ; 42
 L. J. 25.

Insanity
 being once
 established,
 the onus of
 showing its
 cessation at
 the time of
 the execution
 of the will lies
 on the party
 propounding
 the will.

When general or partial insanity is once established, either by the evidence in the case, or by the finding of a jury under a commission of lunacy, to have affected a testator prior to the date of a testamentary instrument impugned, the rule is, that the onus of showing the cessation of the insanity at the time of its execution is cast upon the party setting up the instrument.

Thus, Lord Penzance in *Smith v. Tebbett* (1 L. R. 434; 36 L. J. 36), says, “ If unsoundness extending over years
 “ be once proved by those who oppose a will, there is no
 “ doubt, as a proposition of law, that they are not bound
 “ to carry the evidence of insane actions or delusions up
 “ to the very moment of the testament. A diseased state
 “ of mind once proved to have established itself would be
 “ presumed to continue, and the burden of showing that
 “ health had been restored falls upon those who assert it.”
 So also Sir James Hannen in *Boughton v. Knight*, 3 L. R. 64 ; 42 L. J. 25.

So also the Judicial Committee in *Prinsep v. Dyce Sombre* (10 Moo. P. C. 245), held that where a jury under a commission of lunacy had found the deceased to be of unsound mind, the presumption of law was, that the verdict of the jury was well founded, and that the deceased continued lunatic so long as the commission was not superseded, and that the *onus probandi* must be upon whomsoever asserts complete or partial recovery.

Where a person, sometimes sane and sometimes insane, leaves a testamentary paper sounding to folly, and there is

no direct proof of his state when he made the will, it would be presumed to have been made during his insanity.

Arbery v. Astie, 1 Hagg. 219.

A person by the visitation of God, by extreme old age or by some other infirmity or illness, or by being *in extremis*, may be unequal to the important act of disposing of his property. In *Harwood v. Baker* (3 Moo. P. C. 290), Erskine, J., in delivering the opinion of the Judicial Committee, says, that in order to constitute a sound disposing mind, "the testator must not only be able to understand that he is by his will giving the whole of his property to the object of his regard, but must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his will, he is excluding from participation in that property."

Testamentary unsoundness of mind arising from old age or illness.

When a man is drunk or under the influence of excessive drinking he is incapable of making a will; but where, although an habitual drunkard, he is not under the excitement of liquor, he is not incapable of making a will. *Billinghurst v. Vicars*, 1 Phill. 193; *Ayrey v. Hill*, 2 Add. 206.

Testamentary incapacity arising from drunkenness.

Another ground for invalidating a will, is that its execution was obtained by undue influence.

Undue influence.

The onus of proving undue influence is on the party alleging it.

On the subject of undue influence, Chief Baron Eyre, in *Mountain v. Bennett* (1 Cox, 355), says, "There is another ground which, though not so distinct as that of actual force, nor so easy to be proved, yet if it should be made out, would certainly destroy the will: that is, if dominion was acquired by any person over a mind of sufficient sanity for general purposes, and of sufficient soundness and discretion to regulate his affairs in general; yet if such dominion or influence were acquired over him, as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind."

What constitutes undue influence.

Mountain v. Bennett.

On the same subject, Lord Penzance, in summing up in *Hall v. Hall* (1 L. R. 482; 37 L. J. 40), gave the follow-

Hall v. Hall.

ing direction to the jury: "To make a good will a man
 " must be a free agent. But all influences are not unlaw-
 " ful. Persuasion, appeals to the affections, or ties of
 " kindred, to a sentiment of gratitude for past services, or
 " pity for future destitution, or the like,—these are all
 " legitimate, and may be fairly pressed on a testator. On
 " the other hand, pressure of whatever character, whether
 " acting on the fears or the hopes, if so exerted as to over-
 " power the volition without convincing the judgment, is
 " a species of restraint under which no valid will can be
 " made. Importunity or threats, such as the testator has
 " not the courage to resist, moral command asserted and
 " yielded to for the sake of peace and quiet, or of escaping
 " from distress of mind or social discomfort,—these, if carried
 " to a degree in which the free play of the testator's judg-
 " ment, discretion, or wishes is overborne, will constitute
 " undue influence, though no force is either used or
 " threatened. In a word, a testator may be led but not
 " driven; and his will must be the offspring of his own
 " volition, and not the record of some one else's."

*Boyse v.
 Rossborough.*
 Nature of
 evidence by
 which undue
 influence may
 be esta-
 blished.

In *Boyse v. Rossborough* (6 H. of L. Cases, 51), Lord
 Chancellor Cranworth says, on the same subject, "In order
 " to set aside the will of a person of sound mind, it is not
 " sufficient to show that the circumstances attending its
 " execution are consistent with the hypothesis of its having
 " been obtained by undue influence. It must be shown
 " that they are inconsistent with a contrary hypothesis.
 " The undue influence must be an influence exercised in
 " relation to the will itself—not an influence in relation to
 " other matters or transactions. But this principle must
 " not be carried too far. Where a jury sees that at and
 " near the time when the will sought to be impeached
 " was executed the alleged testator was, in other impor-
 " tant transactions, so under the influence of the person
 " benefited by the will, that as to them he was not a free
 " agent, but was acting under undue control; the circum-
 " stances may be such as fairly to warrant the conclusion,

“ even in the absence of evidence bearing directly on
 “ the execution of the will, that in regard to that also the
 “ same undue influence was exercised.”

It is essential to the validity of a will, that the testator should know and approve of its contents at the time of its execution.

For a will to be valid the testator must know and approve of its contents at the time of its execution.

There are two dicta of Sir C. Cresswell in *Middlehurst v. Johnson* (30 L. J. 14), and in *Cunliffe v. Cross* (3 S. & T. 37; 32 L. J. 68), to the effect that a man may make a good will without knowing anything of its contents. The correctness of this proposition was contested in *Husletoe v. Stobie* (1 L. R. 64; 35 L. J. 18), when Lord Penzance ruled that on principle and authority it was by the law of England essential to the validity of a will, that at the time of its execution the testator should know and approve of its contents; and, shortly afterwards, a new rule of the Court of Probate was issued, permitting the setting up of such a defence to a will by plea (R. 40, 1865); and this defence is now sanctioned by the Judicature Act. (See par. 3 of Form of Statement of Defence, App. 1, C. No. 23.)

The question as to the nature of the evidence requisite to establish or defeat this defence; and as to the party on whom the onus of proving the defence lies, has been the subject of argument and decision in several cases. In *Guardhouse v. Blackburn* (1 L. R. 116; 35 L. J. 116), Lord Penzance says, “ After much consideration, the
 “ following propositions commend themselves to the Court,
 “ as rules which, since the statute (1 Vict. c. 26), ought to
 “ govern its action in respect of a duly-executed paper:—
 “ First, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew
 “ and approved of the contents at the time he signed it:
 “ secondly, that, except in certain cases, where suspicion
 “ attaches to the document, the fact of the testator’s execution is sufficient proof that he knew and approved the
 “ contents: thirdly, that although the testator knew and
 “ approved the contents, the paper may still be rejected

“ on proof establishing, beyond all possibility of mistake,
 “ that he did not intend the paper to operate as a will :
 “ fourthly, that, although the testator did know and
 “ approve the contents, the paper may be refused probate,
 “ if it is proved that any fraud has been purposely prac-
 “ tised on the testator in obtaining his execution thereof:
 “ fifthly, that, subject to this last preceding proposition,
 “ the fact that the will has been duly read over to a
 “ capable testator on the occasion of its execution, or that
 “ its contents have been brought to his notice in any other
 “ way, should, when coupled with his execution thereof,
 “ be held conclusive evidence that he approved as well as
 “ knew the contents thereof : sixthly, that the above rules
 “ apply equally to a portion of the will as to the whole.”

In *Cleare v. Cleare* (1 L. R. 658; 38 L. J. 81), Lord Penzance says: “ That the testator did know and approve
 “ of the contents of the alleged will is part of the burthen
 “ of proof assumed by every one who propounds it as a
 “ will. The burthen is satisfied *primâ facie*, in the case of a
 “ competent testator, by proving that he executed it. But
 “ if those who oppose it succeed by a cross-examination
 “ of the witnesses, or otherwise, in meeting this *primâ*
 “ *facie* case, the party propounding must satisfy the tri-
 “ bunal affirmatively that the testator did really know and
 “ approve of the contents of the will in question before it
 “ can be admitted to probate.”

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In *Phillips v. Longbourne* (not reported), Sir G. Jessel, M. R. (James, L. J., concurring), held, (on the attorney-general, Sir J. Holker, Dr. Tristram with him, moving for a new trial), that where the capacity of the testator was admitted, the *primâ facie* presumption was that the testator knew and approved of all the contents of a will he had executed, and that the burthen of showing affirmatively that he did not know and approve of the contents, or of any portion of the contents of such will, was upon the party who denied such knowledge and approval.

In *Atter v. Atkinson* (1 L. R. 670), Lord Penzance

directed the jury thus:—"If you are satisfied that the testatrix read this document, then, as a proposition of law, I feel bound to direct you that she must be taken to have known and approved of its contents. If, being of sound mind and capacity, she read this residuary clause, the fact that she afterwards put her signature to it, is conclusive to show that she knew and approved of its contents."

The above propositions, as laid down by Lord Penzance in the last two cases, came under review in the House of Lords in *Fulton v. Andrew* (L. R., 7 Eng. & Ir. Appeals, 448; 44 L.J. 17), in which case the jury had found that the testator was of sound mind at the time of the execution of the will propounded, but that he did not know and approve of the contents of the residuary clause, containing an absolute bequest of his residuary estate in favour of two strangers in blood, the executors and plaintiffs, and who were instrumental in the making of the will. The evidence was, that one of them read the will over to the testator two days before its execution, and left it with him until the morning of its execution. There was, however, a discrepancy between the written instructions for the will, by which the residue was left undisposed of, and the will itself, which gave the residue to the plaintiffs, and it was admitted that the testator's attention was not, at the time of its execution, drawn to this discrepancy. Mellor, J., on this evidence, directed the jury to take into consideration the discrepancies between the instructions for the will and the will itself, and having done so, to determine whether the testator had known and understood the residuary clause. The jury found, as before stated, on this issue for the defendants. Upon a motion for a new trial, Lord Penzance held, that there was a misdirection, and that the judge ought to have told the jury, that if they were satisfied that the testator was of sound mind and read the will, or had it read to him, and after that executed it, they were bound to find that he knew and approved of the contents thereof including the residuary clause, and made the rule absolute

to enter a verdict for the plaintiffs. The House of Lords reversed this decision, upholding the ruling of Mellor, J., and the verdict of the jury. Lord C. Cairns, in delivering his judgment, says:—"It is said, that it has been established by certain cases (*Guardhouse v. Blackburn* and *Atter v. Atkinson*), that in judging of the validity of a will, or of part of a will, if you find that the testator was of sound mind, memory and understanding, and if you find, farther, that the will was read over to him, or read over by him, there is an end of the case; that you must at once assume that he was aware of the contents of the will, and that there is a positive and unyielding rule of law that no evidence against that presumption can be received. My lords, I should in this case, as indeed in all other cases, greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by act of parliament. I think it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, and laid down now for the first time, unless the legislature has, in the shape of an act of parliament, distinctly imposed that rule.

"But, now, let us see what is the authority for the imposition of such a fixed and unyielding rule of law. Before looking at the two cases which were cited, I will take the liberty of reminding your lordships of the law which has been laid down in general terms as to the mode of dealing with testamentary instruments like the present, where persons who are strangers to the testator, and who themselves have obtained or conducted the making of the will, are the persons benefiting by the will. In the well-known case of *Barry v. Butlin* (2 Moo. P. C. 480), before the Judicial Committee of the Privy Council, Mr. Baron Parke, delivering the opinion of the Judicial Committee, said this:—(1) 'The rules of law according to which cases of this nature are to be decided do not admit of any dispute, so far as they are necessary to the deter-

Onus probandi where the principal beneficiary has taken part in the preparation of the will.

“ ‘mination of the present appeal, and they have been
“ ‘acquiesced in on both sides. These rules are two : the
“ ‘first, that the *onus probandi* lies in every case upon the
“ ‘party propounding a will, and he must satisfy the
“ ‘conscience of the Court, that the instrument so pro-
“ ‘pounded is the last will of a free and capable testator. The
“ ‘second is, that if a party writes or prepares a will under
“ ‘which he takes a benefit, that is a circumstance that
“ ‘ought generally to excite the suspicion of the Court,
“ ‘and calls upon it to be vigilant and jealous in examin-
“ ‘ing the evidence in support of the instrument, in favour
“ ‘of which it ought not to pronounce unless the suspicion
“ ‘is removed, and it is judicially satisfied that the paper
“ ‘propounded does express the true will of the deceased.
“ ‘These principles, to the extent that I have stated, are
“ ‘well established. The former is undisputed. The
“ ‘latter is laid down by Sir John Nicholl, in substance, in
“ ‘*Paske v. Ollatt* (2 Phil. 323) ; *Ingram v. Wyatt* (1 Hagg.
“ ‘388) ; *Billinghurst v. Vickers* (1 Phil. 187) ; and is stated
“ ‘by that very learned and experienced judge to have
“ ‘been handed down to him by his predecessors, and this
“ ‘tribunal has sanctioned and acted upon it in a recent
“ ‘case.’ That recent case was the case of *Baker v. Batt*
“ ‘(2 Moo. P. C. 317). Now, my lords, bearing in mind the
“ ‘general principles there enunciated, let me direct your
“ ‘lordships’ attention to the two cases occurring in the
“ ‘Court of Probate, and heard before the very learned judge
“ ‘from whose decision the present appeal comes, two cases
“ ‘which were referred to in the argument of this case. The
“ ‘one is the case of *Atter v. Atkinson*, in which there is a
“ ‘report of a charge of Lord Penzance to a jury. In that
“ ‘case the jurors, it appears, were discharged, as they could
“ ‘not agree upon a verdict ; but this is the portion of the
“ ‘charge which was referred too. I should state that that
“ ‘was a case in which, as here, a solicitor who was a
“ ‘stranger to, or at least not a relative, of the testatrix, was
“ ‘named as the residuary legatee under the will ; but the

“ execution of the will by the testatrix was performed in
“ the presence of another solicitor. Lord Penzance there
“ addresses the jury in these terms :—‘ The question of fact
“ ‘ is, did Mrs. Newcombe really ever read the contents of
“ ‘ this document ? If you are satisfied she read it, then,
“ ‘ as a proposition of law, I feel bound to direct you that
“ ‘ she must be taken to have known and approved of its
“ ‘ contents. If, being of sound mind and capacity, she
“ ‘ read this residuary clause, the fact that she afterwards
“ ‘ put her signature to it is conclusive to show that she
“ ‘ knew and approved of its contents. Reflect on the
“ ‘ contrary proposition. Suppose that a long will with a
“ ‘ number of complicated arrangements is read to a com-
“ ‘ petent testator, and is executed by him, if we were
“ ‘ permitted some time after his death to enter into a
“ ‘ discussion as to how far he understood and appreciated
“ ‘ the bearings of all the different parts of the will, we
“ ‘ should upset half the wills in the country. Once get
“ ‘ the facts admitted or proved that a testator is capable,
“ ‘ that there is no fraud, that the will was read over to him,
“ ‘ and that he put his hand to it, and the question whether
“ ‘ he knew and approved of the contents is answered.’

“ My lords, although I do not think it necessary in the
“ present case to determine the question, I do not know
“ that there is anything in that direction, taken as a
“ whole, to which I could venture to make any objection :
“ but you will observe the very important qualification—I
“ say, ‘ taken as a whole.’ In the first place, the jury
“ must be satisfied that the will was read over, and in the
“ second place must also be satisfied that there was no
“ fraud in the case. Now, applying these observations to
“ the present case, I will ask your lordships to observe
“ that we have no means of knowing what was the view
“ which the jury, in the present case, took with regard to
“ the reading over of the will. The only witnesses upon
“ the subject were those witnesses who themselves were
“ propounding the will. No person else was present—no

“ person else knew anything upon the subject. It appears
 “ that these witnesses stated either that the will was read
 “ over to the testator, or that it had been left with him
 “ over-night for the purpose of being read over. The
 “ jury may, or may not, have believed that statement, or
 “ may have thought, even if there had been some reading
 “ of the will, that that reading had not taken place in such
 “ a way as to convey to the mind of the testator a due
 “ appreciation of the contents and effects of the residuary
 “ clause; and it may well be that the jurors, finding a
 “ clear expression of the intention of the testator, or what
 “ they may have thought to be a clear expression of the
 “ intention of the testator, in the instructions for the will,
 “ were not satisfied that there was any such proper read-
 “ ing or explanation of the will as would apprise the
 “ testator of the change, if there was a change, between
 “ the instructions and the will.

There should be a proper reading over or explanation of the will, so as to convey to the testator's mind the contents and effects of its dispositions.

“ But, my lords, moreover, how does the qualification
 “ that there must be no fraud bear upon the present case?
 “ It is very difficult to define the various grades or shades
 “ of fraud; but it is a very important qualification to
 “ engraft upon the general state of things, that the read-
 “ ing over of a will to a competent testator must be taken
 “ to have apprised him of the contents. If your lord-
 “ ships find a case in which persons who are strangers to
 “ the testator, who have no claim upon his bounty, have
 “ themselves prepared, for their own benefit, a will dis-
 “ posing in their favour of a large portion of the property
 “ of the testator; and if you submit that case to a jury,
 “ it may well be that the jury may consider that there
 “ was a want, on the part of those who propounded the
 “ will, of the execution of the duty which lay upon them,
 “ to bring home to the mind of the testator the effect of
 “ his testamentary act; and that that failure in performing
 “ the duty which lay upon them amounted to a greater or
 “ less degree of fraud on their part. The qualification of

The failure of a party, who has prepared a will in his own favour, to bring home to the testator's mind the effect of his testa-

mentary act,
would amount
to a fraud.

“ Lord Penzance in the charge I have read may entirely
“ apply to such a case.

“ The other case which came before the same learned
“ judge is that of *Guardhouse v. Blackburn*. In that case
“ the learned judge laid down certain propositions which
“ he said commended themselves to his mind as rules
“ which since the statute ought to govern his action in
“ respect of a duly executed paper ; and the statement of
“ those rules was this :—

“ ‘ Thirdly, although the testator knew and approved
“ ‘ the contents, the paper may still be rejected, on proof
“ ‘ establishing, beyond all possibility of mistake, that he
“ ‘ did not intend the paper to operate as a will. Fourthly,
“ ‘ that although the testator did know and approve the
“ ‘ contents, the paper may be refused probate if it be
“ ‘ proved that any fraud has been purposely practised on
“ ‘ the testator in obtaining his execution thereof. Fifthly,
“ ‘ that, subject to this last preceding proposition, the fact
“ ‘ that the will has been duly read over to a capable
“ ‘ testator on the occasion of its execution, or that its
“ ‘ contents have been brought to his notice in any other
“ ‘ way, should, when coupled with his execution thereof,
“ ‘ be held conclusive evidence that he approved as well as
“ ‘ knew the contents thereof.’

“ Therefore, my lords, I come to the conclusion that,
“ even if these rules, laid down in this way by Lord
“ Penzance are to be accepted as rules which should be
“ applied to the case of every testamentary instrument,
“ still, with regard to the present case, they do not carry
“ to my mind any persuasion that there was a non-
“ direction, on the part of the learned judge who tried the
“ cause, in a matter which he ought to have laid before
“ the jury. It appears to me that, consistently with the
“ rules mentioned by Lord Penzance, the jurors here
“ may not have been satisfied that there was a proper
“ reading of the will to the testator, or may have been

“satisfied, after hearing all the facts submitted to them
 “by Mr. Justice Mellor, that there was on the part of
 “those who propounded the will such a dereliction of
 “duty, such a failure of duty on their part, as amounted
 “to that degree of fraud to which Lord Penzance refers
 “in the rules I have mentioned.”

There are other defences which may be set up to a will in addition to those specified in the form of a statement of defence given in the schedule to the Judicature Act; *e. g.*,

(1.) That the paper, though testamentary on the face of it, and duly executed, was executed by the deceased without any intention that it should affect the disposition of his property after death; in other words, that it was executed as a sham will. *Lister v. Smith*, 3 S. & T. 282; 33 L. J. 29; *Trevelyan v. Trevelyan*, 1 Phill. 149; *Nichols v. Nichols*, 2 Phill. 180. A sham will.

(2.) That the deceased had subsequently to the execution of the will contracted a marriage valid by the law of England. Revocation of a will by marriage of testator.

By 1 Vict. c. 26, s. 18, “Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment), when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin, under the Statute of Distributions.”

But where a will has been made in execution of a power, and the property disposed of by the will would, in default of appointment, pass by virtue of the limitations contained in the instrument creating the power to the heir-at-law, customary heir, executor, administrator, or next-of-kin, under the Statute of Distributions, the marriage of the appointor will not revoke such will. *In the goods of Fitzroy*, 1 S. & T. 133.

(3.) That the will propounded has been revoked either expressly or by implication by a will or other testamentary paper of later date. Will revoked by a subsequent testa-

mentary
paper ex-
pressly or by
implication.
Sect. 20.

By sect. 20 of 1 Vict. c. 26, "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Where a testamentary paper contains express words of revocation of all testamentary dispositions of prior date no difficulty arises as to the effect of such revocatory clause.

An appoint-
ment under a
general power
not revoked
by a revoca-
tory clause in
general terms.

But a will made in execution of a general power of appointment is not revoked by a revocatory clause in general terms and containing no reference to the general power. *In the goods of Merritt*, 1 S. & T. 112; *In the goods of Graham*, 3 S. & T. 69; 32 L. J. 113.

But where there is no express revocatory clause, and the only revocation (if any) is by implication, the question frequently is not one of easy solution.

Where the dispositions of the subsequent will are wholly inconsistent with those contained in the prior will, the subsequent will works a total revocation of the prior one. Thus, where the latter will contains a complete disposition of the testator's property, the earlier will is thereby revoked.

But the mere fact that the later will contains the expression, "This is my last will and testament," does not alone work a revocation of all previous testamentary papers. *Cutto v. Gilbert*, 9 Moo. P. C. 131.

Where there are two testamentary papers, each professing in form to be the last will of the deceased, the Court, in determining whether one or both of them are entitled to probate, must be guided by the consideration, not whether the testator intended them both to form his will, but what dispositions of his property as collected

from the language of all the papers he designed to revoke or retain. So that where a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both of the papers are entitled to probate. *Lemage v. Goodban*, 1 L. R. 57; 35 L. J. 28.

4. That the will was revoked by the same having been burnt, torn, or otherwise destroyed, by the testator, or by some person in his presence, and by his direction, with the intention to revoke the same. 1 *Vict. c. 26*, s. 20.

(a) A will may be revoked by the act of burning.

There must be an actual burning to some extent. An attempt (not carried into effect), coupled with an intention to burn, will not work a revocation. Thus in *Doe v. Harris*, 6 A. & E. 209, a testator threw a will on the fire with the intention of destroying it. A devisee snatched it off against his wishes, and afterwards promised him to burn it, but never did. The envelope, but no part of the will, was affected by the fire. The Court of Queen's Bench held that the will, so far as it related to freehold property, was not revoked, as there was no such burning as would satisfy the Statute of Frauds, and this decision is applicable to 1 *Vict. c. 26*, s. 20. 1 *Williams on Executors*, 8th ed., 139. It was laid down in this case, "that there must be a partial burning of the instrument itself; there must be a burning of the paper on which the will is, so that the instrument no longer exists as it was."

Revocation by burning.

(b) A will may be revoked by the act of tearing, but the act must have been completed to effect a revocation.

Thus in *Doe v. Perkes* (3 B. & A. 489), where the testator, in a fit of sudden anger against one of the devisees under his will, tore it twice through; but, his arm being arrested by a bystander, and his anger mitigated by the submission of the devisee, proceeded no further, and, after having fitted the pieces together, and finding that no particular word had been obliterated, said, "It is a good job it is no worse;" the Court of King's Bench held that the

Revocation by tearing.

jury were right in finding that there was no revocation. See also *In the goods of Colberg*, 2 Curt. 832.

Again, in *Elms v. Elms* (1 S. & T. 155; 27 L. J. 96), the testator was on orders for India, and having expressed an intention to make a new will, tore his will almost in two pieces, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing will before making another, and then let the will fall on the ground, and in a few minutes picked it up and refused to burn it. It was replaced in his drawers, and he afterwards burnt other papers when about to sail for India, but not the will, to which his attention was at the time drawn, and he subsequently showed a paper, which he called his will, to the principal legatee. He sailed for India, still expressing his intention of making a new will. Sir C. Cresswell held, that, in order to revoke a will by tearing, it is not necessary to rend it into more pieces than it originally consisted of, but that it is sufficient if the testator intended the tearing actually done of itself to work a revocation, without any further act; but that in this case, there being satisfactory evidence that the paper had been duly executed, and no evidence to prove that, by partial tearing, the testator had carried into effect the original intention he had to revoke the instrument, it was entitled to probate.

Cutting is equivalent to tearing.

Where a testator tears or cuts away his own signature to the will, or the signatures of either of the attesting witnesses, this amounts to a revocation. *Hobbs v. Knight*, 1 Curt. 768; *In the goods of Gullan*, 1 S. & T. 23; 27 L. J. 15.

But where a testator tears or cuts away only a portion of a will, leaving his own signature, or the signatures of the attesting witnesses untouched, this is only a revocation of the portions of the will torn or cut away. *Clarke v. Scripps*, 2 Roberts. 563.

Interpreta-
tion of
the words

“Otherwise destroying the same.” This must be a destruction *ejusdem generis*, as burning and tearing, excluding

cancelling. *Stephens v. Taprell*, 2 Curt. 458; *Cheese v. Lovejoy*, 2 P. Div. 251; 46 L. J. 66. “otherwise destroying.”

When a will has been traced into the testator's custody, and there is no evidence of its having subsequently gone out of his custody, and it is not forthcoming at his death, there is a *prima facie* presumption of fact, that it was destroyed by him *animo revocandi*. This presumption may be rebutted by probable circumstances, amongst which declarations by the testator of unchanged affection and intention have much weight. *Patten v. Poulton*, 1 S. & T. 55; 27 L. J. 41; *Welsh v. Phillips*, 1 Moo. P. C. 302.

The strongest proof of adherence to the will, and of the improbability of its destruction, arises from the contents of the will itself. *Saunders v. Saunders*, 6 N. C. 522.

5. Where there are two totally inconsistent wills, of the same date or undated, and there is no satisfactory evidence to show which of the two was last executed, neither of the wills is entitled to probate. 1 Williams on Executors, 8th ed. 169. Two inconsistent wills.

When a will has been revoked in one of the modes directed by 1 Vict. c. 26, and the deceased has left a duly-executed codicil to such will, which has not by any act of his been expressly revoked, the question has been raised as to whether the codicil falls with the will, as forming part of it. By the law prior to 1 Vict. c. 26, a codicil was held to be *prima facie* dependent on the will, and unless there was evidence that it was intended to operate separately from the will, the revocation of the will involved the revocation of the codicil. In *Grimwood v. Cozens and others* (2 S. & T. 364), Sir C. Cresswell decided that the statute had not altered the law. But in *Black v. Jobling* (1 L. R. 685; 38 L. J. 74), Lord Penzance, after a careful review of previous cases, and the words of the statute, came to the conclusion that the effect of the statute had not been fully considered in the previous cases, and that the intention of sect. 20 of 1 Vict. c. 26 was to do away with all implied revocations, and that therefore, if a codicil itself was not revoked by one A codicil not revoked by revocation of the will to which it was a codicil.

of the modes indicated by the statute, notwithstanding the revocation of the will, it was entitled to probate. See also *In the goods of Savage*, 2 L. R. 78; 39 L. J. 25; *In the goods of Turner*, 2 L. R. 403.

Revocation of a will executed in duplicate.

When a will has been executed in duplicate, the revocation of one duplicate by any of the modes directed by the statute, is in law the revocation of both. *Killican v. Parker*, 1 Lee, 662; *Boughey v. Morton*, 3 Hagg. 191.

There must be the animus revocandi to work a revocation.

To effect a revocation, there must be an intention in the testator to revoke. Wherever, therefore, there is an absence of such intention,—as when a will is burnt, torn, or otherwise destroyed by a testator by accident, or when of unsound mind, or under an erroneous impression of law or fact,—the act so done does not work a revocation.

Presumption as to revocation by the act of a testator which has been done when it was uncertain whether he was sane or insane.

Where a will has been in the custody of a testator at a time when he has been of unsound as well as of sound mind, and upon his death it is discovered to have been torn by him, or is not forthcoming, the burden of showing that it was revoked by him, by tearing or by destruction, when of sound mind, lies upon the party who sets up the revocation. *Harris v. Berrall*, 1 S. & T. 153; *Sprigge v. Sprigge*, 1 L. R. 608; 38 L. J. 4.

A testator, having erased a clause in his will after the execution, asked a friend to make a fresh copy of the will, omitting the erased clause. The copy was made; but the person who made it by mistake omitted several other clauses. The copy was duly executed, and the omissions were not discovered until after the testator's death, both wills having remained in his custody up to that time. The two wills were not inconsistent with each other, and the latter contained no express clause of revocation. Probate was granted of both documents upon parol evidence of the circumstances under which they were drawn up and executed, as together containing the deceased's last will and testament. *Birks v. Birks*, 4 S. & T. 23; 34 L. J. 90.

A testator, under the false impression that his will was invalid, tore it up. Immediately afterwards on recon-

sideration, he collected the pieces and placed them amongst his papers of importance, saying they would be of use to the residuary legatee at some future time, and preserved them till his death. Lord Penzance held, that as the act done was not accompanied by an intention to revoke, the will was entitled to probate. *Giles and Clark v. Warren*, 2 L. R. 401; 41 L. J. 59.

The tearing, cutting or destruction of a will by a testator under a mistaken impression of law or fact is technically termed a dependent relative revocation, and as the act was conditional, and the condition is unfulfilled, there is no revocation. Thus where a testator had executed a will in 1864, which he destroyed in 1865, with an intention expressed at the time, that he wished to substitute for it a will of 1862, which he held in his hand, Lord Penzance, held that the act of destruction being referable solely to his intention to validate the will of 1862, and that act being conditional, and the condition being unfulfilled, the will of 1864 was entitled to probate. *Powell v. Powell*, 1 L. R. 209; 35 L. J. 100.

A testatrix, having her will in her hand, dictated the alterations she desired to be made in the first part of it to a friend, who wrote them down. The testatrix feeling unwell, desired her friend to stop there, and then tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause and the signatures of the testatrix and witnesses and the attestation clause intact, was placed in a desk by the testatrix and locked up, and she believed when she did so that these papers constituted a new will, and were not merely instructions for such a will:—Held, that it was a case of dependent relative revocation, a revocation dependent on the papers locked up constituting a new will, and probate was granted of the original will as contained in the portion which remained and the draft of the part which was destroyed. *Daneer v. Crabb*, 3 L. R. 98; 42 L. J. 53.

Dependent
relative
revocation.

CHAPTER XI.

ALLEGATIONS REQUIRING SPECIFIC DENIAL IN REPLY—
 RULE AS TO PLEADING FRESH MATTER IN REPLY—RE-
 VIVAL OF REVOKED WILL—TIME FOR DELIVERY OF REPLY
 AND SUBSEQUENT PLEADINGS—ORDER XXV. CLOSE OF
 PLEADINGS—ORDER XXVI. ISSUES—ORDERS XVI. AND XXVII.
 AMENDMENTS OF WRIT OF SUMMONS AND OF PLEADINGS
 —ORDER XXVIII. DEMURRER—ORDER XXIX. DEFAULT OF
 PLEADING AND OF PLEADINGS.

ORDER XXIV.

Reply.

Reply.

“THE plaintiff shall deliver his reply, if any, within three
 “ weeks after the defence or the last of the defences shall
 “ have been delivered, unless the time shall be extended
 “ by the Court or a judge.” R. 1.

Form of Reply.

Form of
 reply.

“ 1. The plaintiff joins issue upon the statement of de-
 “ fence of the defendant, as contained in the first, second,
 “ third, fourth, and fifth paragraphs thereof.

“ 2. The plaintiff says that the said will of the said de-
 “ ceased, dated the 1st of January, 1873, was duly revoked
 “ by the will of the said 1st of October, 1873, propounded
 “ by the plaintiff in his statement of claim.”

What allega-
 tions require
 to be specifi-
 cally denied.

Where the statement of defence contains a charge of
 undue influence or of fraud, or an allegation that the de-
 ceased at the time of the execution of the instrument pro-
 pounded did not know and approve of its contents, or any
 averment other than a denial of the due execution of the
 will, and of the testamentary capacity of the deceased at
 the time of its execution, the plaintiff should in his reply
 specifically traverse the charge or allegation as pleaded.
 See Order XIX. Rs. 20, 22; *Thorp v. Holdsworth*, 3 Ch.
 Div. 637; 45 L. J., Ch. 406; *Byrd v. Nunn*, 7 Ch. Div.
 284; 47 L. J., Ch. 1.

A plaintiff is entitled to reply by traverse, confession, and avoidance, or both combined. "There is no limit," says James, L. J., in *Hall v. Eve* (4 Ch. Div. 345, C. A.; 46 L. J., Ch. 145), "as to what may be said in reply, except that it must not be scandalous or irrelevant. The plaintiff is left as much at liberty in his reply as in his statement of claim. . . . It is no part of the statement of claim to anticipate the defence, and to state what the plaintiff would have to say in answer to it."

Where in the statement of defence it is alleged that the will propounded by the plaintiff has been revoked by a subsequent will or testamentary paper, the plaintiff may plead the revival of the will he propounded, by a will or other testamentary paper executed subsequently to the execution of the revoking instrument.

In order to revive a revoked will by a subsequent testamentary instrument, the revoked will must be in existence at the time of the execution of the instrument (*Hall v. Tokelove*, 2 Roberts. 318; *Rogers v. Goodenough*, 2 S. & T. 342; 31 L. J. 49; *In the goods of Steele*, 1 L. R. 575; 37 L. J. 72, n.), and it must also, by referring in adequate terms to the revoked will, show an intention to revive the same. See sect. 22 of 1 Vict. c. 26. "And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in the manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

"In order to satisfy the requirement of the statute that a testamentary instrument has revived the revoked will, it must show an intention to revive the same, and the intention must appear on the face of the instrument, either by express words referring to the will as revoked and import-

Revival of a
revoked will.

1 Vict. c. 26,
s. 22.

“ing an intention to revive the same, or by a disposition of
 “the testator’s property inconsistent with any other inten-
 “tion, or by some other expression conveying to the mind
 “of the Court with reasonable certainty the existence of the
 “intention. Since the passing of this statute a will cannot
 “be revived by mere implication.” *In the goods of Steele*,
 see *infra*.

Thus reference in a codicil to a revoked will by its date
 only has been held insufficient to revive it or to revoke an
 intermediate will, where there was no evidence on the face
 of the codicil of an intention to revive the will so referred
 to and to revoke the intermediate will. *In the goods of*
Steele, 1 L. R. 575; 37 L. J. 72, n.

Leave re-
 quired for
 subsequent
 pleadings.

“No pleading subsequent to reply other than a joinder
 “of issue shall be pleaded without leave of the Court or a
 “judge, and then upon such terms as the Court or a judge
 “shall think fit.” R. 2.

Time for de-
 livery of reply
 and subse-
 quent plead-
 ings.

“Subject to the last preceding rule, every pleading
 “subsequent to reply shall be delivered within four days
 “after the delivery of the previous pleading, unless the
 “time shall be extended by the Court or a judge.” R. 3.

Leave for further time to deliver a pleading is obtained
 by an order of the registrar made on summons.

The registrars hear applications on summons at the
 Principal Probate Registry, Somerset House, every Monday
 during the sittings of the High Court at 12 at noon,
 and every Wednesday during the vacations at 11.30 a. m.

The following is the form of a summons:—

Summons (General Form).

“In the High Court of Justice. 18 . No .

“Probate, Divorce and Admiralty Division.

“(Probate.)

“Between Plaintiff,

“and

“ Defendant.

“Let all parties concerned attend one of the registrars
 “at the Probate Registry of the High Court of Justice at

“ Somerset House, Strand, in the county of Middlesex,
 “ on day the day of 18 , at
 “ o’clock in the noon, on the hearing of an appli-
 “ cation on the part of .
 “ Dated the day of 18 .
 “ This summons was taken out by of solici-
 “ tor for .”

Order for Time.

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Registrar in Chambers.

“ Between . . . Plaintiff,

“ and

“ . . . Defendant.

“ Upon hearing _____, and upon reading the affidavit of
 “ _____ filed the _____ day of _____ 18____, and _____,

“It is ordered that the shall have time and
“that the costs of this application be .

"Dated the day of 18 ."

ORDER XXV.

Close of Pleadings.

“As soon as either party has joined issue upon any
“pleading of the opposite party simply without adding
“any further or other pleading thereto, the pleadings as
“between such parties shall be deemed to be closed.”

ORDER XXVI.

Issues.

“Where in any action it appears to a judge that the
“statement of claim or defence or reply does not suffi-
“ciently define the issues of fact in dispute between the
“parties, he may direct the parties to prepare issues, and
“such issues shall, if the parties differ, be settled by the
“judge.”

AMENDMENTS OF WRIT OF SUMMONS UNDER ORDERS XVI. AND XXVII.

The Court or a judge may now at any stage of an action allow the writ of summons to be amended, by the substitution or addition of a plaintiff or defendant.

Substitution
or addition of
plaintiff.

“Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs, upon such terms as may seem just.” Ord. XVI. R. 2.

“The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out; and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added.” Ord. XVI. R. 13.

Applications
to alter
parties may
be up to and
at the trial.

“Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.” Ord. XVI. R. 14.

Where a
defendant is
added, writ
to be
amended.

“Where a defendant is added, unless otherwise ordered by the Court or judge, the plaintiff shall file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service

“thereof, in the same manner as original defendants are served.” Ord. XVI. R. 15.

“If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or judge, be amended in such manner as the making such new defendant a party shall render desirable; and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice, or afterwards, within four days after his appearance.” Ord. XVI. R. 16.

“The Court or a judge may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons, in such manner, and on such terms, as may seem just.” Ord. XXVII. R. 11.

AMENDMENT OF PLEADINGS UNDER ORDER XXVII.

Under Order XXVII. amendments of pleadings are allowed to be made: (1.) By the party pleading, without an order of the judge or registrar, subject to certain limitations; (2.) By order of the judge or registrar on the application of the party pleading; (3.) By order of the judge or registrar on the application of the opposite party, on the ground that the pleading is immaterial or embarrassing.

Thus a plaintiff may now without leave amend his statement of claim once at any time before the expiration of the time limited for replying, and the defendant who has set up a counter-claim may amend such counter-claim at any time before the expiration of the time allowed him for pleading to the reply and before pleading thereto, subject to the amendment being disallowed by the judge on the application of the opposite party.

“The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the

Amendment
by plaintiff
without leave.

“defendant who shall have last appeared.” Ord. XXVII. R. 2.

Amendment
by defendant
without leave.

“A defendant who has set up in his defence any set-off or counter-claim may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto, or, in case there be no reply, then at any time before the expiration of twenty-eight days from the filing of his defence.” Ord. XXVII. R. 3.

Disallowance
of amend-
ment.

“Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court or a judge to disallow the amendment, or any part thereof; and the Court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just.” Ord. XXVII. R. 4.

Leave to
plead to
amended
pleading.

“Where any party has amended his pleading under rule 2 or 3 of this order, the other party may apply to the Court or a judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just.” Ord. XXVII. R. 5.

2 & 3. For amendments by order of the judge or registrar on the application of the party pleading, or of the opposite party, see the following rules.

Amendment
with leave.

“The Court or a judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.” Ord. XXVII. R. 1.

“ In all cases not provided for by the preceding rules of this order, application for leave to amend any pleading may be made by either party to the Court or a judge in chambers, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just.” Ord. XXVII. R. 6.

Application
for leave to
amend.

“ If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a judge.” Ord. XXVII. R. 7.

Failure to
amend after
order.

“ A pleading may be amended by written alterations in the pleading which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the pleading as amended.” Ord. XXVII. R. 8.

Amendment
by writing
or reprint.

“ Whenever any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz.: ‘ Amended day of .’ ” Ord. XXVII. R. 9.

Marking
pleading as
amended.

“ Whenever a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same.” Ord. XXVII. R. 10.

Delivery of
amended
pleading.

ORDER XXVIII.

Demurrer.

Demurrer to
pleading.

“Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counter-claim, reply, or as the case may be, on the ground that the facts alleged therein do not show any cause of action, or ground of defence to a claim or any part thereof, or set off, or counter-claim, or reply, or as the case may be, to which effect can be given by the Court as against the party demurring.” Ord. XXVIII. R. 1.

To state
specifically if
to whole or
part.

“A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated. A demurrer may be in the Form 28 in Appendix (C.) hereto. If there is no ground, or only a frivolous ground of demurrer stated, the Court or judge may set aside such demurrer, with costs.” Ord. XXVIII. R. 2.

Form.
Costs.

Form of Demurrer.

“In the High Court of Justice.

“Probate, Divorce and Admiralty Division.

“ (Probate.)

“ A. B. v. C. D.

“The defendant [plaintiff] demurs to the [plaintiff’s statement of complaint or defendant’s statement of defence, or of set-off, or of counter-claim], [or to so much of the plaintiff’s statement of complaint as claims or as alleges as a breach of contract the matters mentioned in paragraph 17, or as the case may be], and says that the same is bad in law on the ground that [here state a ground of demurrer] and on other grounds, sufficient in law to sustain this demurrer.”

Delivery.

“A demurrer shall be delivered in the same manner

“and within the same time as any other pleading in the action.” Ord. XXVIII. R. 3.

“A defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party he shall combine such demurrer and other pleading.” Ord. XXVIII. R. 4.

Combination of defence and demurrer.

“If the party demurring desires to be at liberty to plead as well as demur to the matter demurred to, he may, before demurring, apply to the Court or a judge for an order giving him leave to do so; and the Court or judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to him to plead after the demurrer is overruled, or may make such other order and upon such terms as may be just.” Ord. XXVIII. R. 5.

Plea and demurrer to a demurrer.

“When a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately, and the party so entering such demurrer shall on the same day give notice thereof to the other party. If the demurrer shall not be entered, and notice thereof given within ten days after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend, the demurrer shall be held sufficient for the same purposes and with the same result as to costs as if had been allowed on argument.” Ord. XXVIII. R. 6.

Entry of demurrer for argument.

“While a demurrer to the whole or any part of a pleading is pending, such pleading shall not be amended unless by order of the Court or a judge; and no such order shall be made except on payment of the costs of the demurrer.” Ord. XXVIII. R. 7.

Pleadings not to be amended while demurrer pending.

“Where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order,

Costs of successful demurrer to pleadings.

“pay to the demurring party the costs of the demurrer.”
Ord. XXVIII. R. 8.

The like to
statement of
claim.

“If a demurrer to the whole of a statement of claim be
“allowed, the plaintiff, subject to the power of the Court
“to allow the statement of claim to be amended, shall pay
“to the demurring defendant the costs of the action, unless
“the Court shall otherwise order.” Ord. XXVIII. R. 9.

Effects of
successful
demurrer
in other cases.

“Where a demurrer to any pleading or part of a plead-
“ing is allowed in any case not falling within the last
“preceding Rule, then (subject to the power of the Court
“to allow an amendment) the matter demurred to shall as
“between the parties to the demurrer be deemed to be
“struck out of the pleadings, and the rights of the parties
“shall be the same as if it had not been pleaded.” Ord.
XXVIII. R. 10.

Costs of over-
ruled de-
murrer.

“Where a demurrer is overruled the demurring party
“shall pay to the opposite party the costs occasioned by
“the demurrer, unless the Court shall otherwise direct.”
Ord. XXVIII. R. 11.

Pleadings
after demur-
rer overruled.

“Where a demurrer is overruled the Court may make
“such order and upon such terms as to the Court shall
“seem right for allowing the demurring party to raise by
“pleading any case he may be desirous to set up in oppo-
“sition to the matter demurred to.” Ord. XXVIII. R. 12.

Entry of
demurrer.

“A demurrer shall be entered for argument by deliver-
“ing to the proper officer a memorandum of entry in the
“Form No. 29 in Appendix (C).” Ord. XXVIII. R. 13.

Memorandum of Entry of Demurrer for Argument.

“ 18 . B. No. .

“In the High Court of Justice.

“Probate, Divorce and Admiralty Division.

“ (Probate.)

“ A. B. v. C. D.

“Enter for the argument the demurrer of . to .

“X. Y., Solicitor for the plaintiff

“ [or, &c.]”

ORDER XXIX.

Default of Pleading.

“ If the plaintiff, being bound to deliver a statement of
 “ claim, does not deliver the same within the time allowed
 “ for that purpose, the defendant may, at the expiration of
 “ that time, apply to the Court or a judge to dismiss the
 “ action with costs, for want of prosecution ; and on the
 “ hearing of such application the Court or judge may, if
 “ no statement of claim have been delivered, order the ac-
 “ tion to be dismissed accordingly, or may make such other
 “ order on such terms as to the Court or judge shall seem
 “ just.” R. 1.

Default of
pleading.Non-delivery
of claim.

“ In Probate actions, if any defendant make default in
 “ filing and delivering a defence or demurrer, the action
 “ may proceed, notwithstanding such default.” R. 9.

Probate
action.

“ If the plaintiff does not deliver a reply or demurrer, or
 “ any party does not deliver any subsequent pleading, or a
 “ demurrer, within the period allowed for that purpose, the
 “ pleadings shall be deemed to be closed at the expiration
 “ of that period, and the statements of fact in the pleading
 “ last delivered shall be deemed to be admitted.” R. 12.

Non-delivery
of reply or
subsequent
pleading.

CHAPTER XII.

DISCOVERY—GENERAL RULES OF DISCOVERY—GREATER LATITUDE IN GRANTING DISCOVERY IN PROBATE ACTIONS—DOCUMENTS IN DEPOSITORIES OF THE DECEASED—EXCEPTIONS TO GENERAL RULE OF DISCOVERY—RULES IN ORDER XXXI. AS TO DISCOVERY AND INSPECTION—EXAMINATION OF WITNESSES BEFORE TRIAL UNDER AN ORDER OF COURT, A COMMISSION, A MANDAMUS TO INDIA OR THE COLONIES—OR A REQUISITION TO A FOREIGN COURT—ADMINISTRATION PENDENTE LITE—RECEIVER OF REAL ESTATE—APPLICATION FOR APPOINTMENT OF AN ADMINISTRATOR PENDENTE LITE AND RECEIVER—PRACTICE—CASES WHERE COURT DECLINES TO APPOINT—AFFIDAVIT OF ADMINISTRATOR PENDENTE LITE TO LEAD THE GRANT—SECURITY BY RECEIVER OF REAL ESTATE—FORM OF BOND—FORMS OF DECLARATION OF PERSONAL ESTATE AND OF INVENTORY—PASSING ACCOUNTS—PAYMENT OF MONEY OUT OF COURT—ORDER LII.—INTERIM ORDERS FOR PRESERVATION OF PROPERTY—MANDAMUS—INJUNCTIONS.

DISCOVERY.

UNDER the Judicature Act, the right to discovery is regulated by the rules previously existing in the Court of Chancery. *Anderson v. Bank of British Columbia*, 2 Ch. Div. 664; 45 L. J., Ch. 449.

General rule
of discovery.

By the rule of the Court of Chancery, any party to an action was entitled to a discovery of any fact within his opponent's personal knowledge and of any documents in his custody or under his control, which might assist him in establishing his right to relief, or in his defence to any relief claimed. Mitford on Pleading, 307. A defendant was not bound to disclose what was exclusively matter of defence, but that which was common to both the plaintiff and defendant might be inquired into by either. See *Whately v. Crawford*, 5 El. & B. 709; 25 L. J., Q. B. 163.

The rules which govern the relative rights of parties to an action to discovery, may be thus stated :

The plaintiff has a right of discovery from the defendant of all facts within the defendant's personal knowledge, and of all documents in his custody or under his control, which may tend affirmatively to establish the plaintiff's case. Plaintiff's right of discovery.

The defendant has a right of discovery from the plaintiff of all facts within the plaintiff's personal knowledge, and of all documents in his custody, or under his control, which may tend affirmatively to establish the claim set up by the plaintiff, or which may assist the defence. Defendant's right of discovery.

The plaintiff is not entitled to discovery of facts or documents which go solely to support the defence of the defendant, in other words, which are exclusively matter of defence; but the disclosure of facts or documents which may assist affirmatively to support either the case of the plaintiff or defendant may be required by either party. *Whately v. Crawford*, 5 El. & B. 709; 25 L. J., Q. B. 163.

Where the defendant sets up a counter-claim, the plaintiff will be entitled to discovery of all facts within the defendant's personal knowledge, and of all documents in the defendant's custody or under his control, which may tend affirmatively to establish the counter-claim, or which may assist his case against the counter-claim. And the defendant will be entitled to discovery from the plaintiff of all facts within the plaintiff's personal knowledge, and of all documents in his custody or under his control, which tend affirmatively to establish his counter-claim. Discovery in case of a counter-claim.

In consequence of the peculiar nature of the inquiry in probate causes, the Court exercises a wider latitude in ordering discovery in these suits than is exercised in other actions. Where the issue raised relates to the testamentary capacity of the deceased, the inquiry may legitimately extend to the history of a considerable portion, or of even the whole, of his life; and it is extremely difficult to say The Probate Court exercises a wider latitude in ordering discovery in Probate causes than other courts do, owing to the nature of the

issues raised
in Probate
actions.

before the trial what evidence relating to any particular portion of his life may or may not at the trial turn out to be material to this issue. The same observation, though to a less extent, applies in cases where the issue raised is one of undue influence, or of fraud, or that the deceased did not know and approve of the contents of a will.

The practice of the Court, therefore, is to order discovery of all facts and documents throwing light on the history of the deceased, which might turn out to have any possible bearing on the issues raised.

Inspection of
documents in
the deceased's
depositories.

With regard to documents and other papers belonging to the deceased, there seems to be no reason why they should not, subject to some limitation, be open to the inspection of either party, unless the party in whose custody, or under whose control they happen be, can show that he has any special interest or property in them. Upon the death of the deceased they in very many cases come under the control of one of the parties to the suit, by the mere accident of his having been about him at the time of his death, or of his being first to take possession of his house, or of his employing his solicitor, and, unless an administrator *pendente lite* is appointed, they remain under his control pending the inquiry. But by this accident he ought not to be allowed an advantage in the action over his opponent.

In a probate cause, the function of the Court is not only to do justice between the parties, but also to do justice to the deceased, by ascertaining, and ultimately by its decree giving effect to all duly executed testamentary instruments by which he intended to dispose of his property; and, to ascertain this fact, the Court should know as far as possible what he knew, and much of such knowledge is to be found in the papers left by him in his depositories. In justice to the testator, therefore, either party may claim to have an opportunity of directing the attention of the Court to such of his papers as he may consider tends to support his own case, and to do this access to very many of them is necessary.

These general rules as to the title to discovery are, however, subject to some exceptions.

There are certain communications and documents which are termed in law privileged, and which a party to an action is not compellable, under an order for discovery, to disclose to his adversary. Thus—

Privileged
communica-
tions.

1. A party is not compelled to disclose communications which have passed between himself and his legal adviser, pending the litigation in question, and with reference to it.

2. A party is not compelled to disclose communications which have passed between himself and his legal adviser before the litigation in question had arisen, but in anticipation of and in reference to such litigation.

3. A party is not compelled to disclose communications which have passed between himself and his legal adviser after the dispute, which has resulted in litigation, had arisen between the parties, but not in contemplation of or in reference to such litigation.

4. A party is not compelled to disclose advice given by a legal adviser in reference to the subject in dispute, before the dispute arose. *Walsingham v. Goodricke*, 3 Hare, 122.

5. A party is not compelled to disclose cases, or statements of fact, or documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, if they were prepared with a *bona fide* intention of their being laid before him, with the intention of taking his advice thereon. *Southwark and Vauxhall Water Company v. Quick*, 3 Q. B. Div. 315; 47 L. J., Q. B. 258.

6. A party is not compelled to disclose cases or statements of fact relative to the question in issue, which have reference to disputes with other persons. *Walsingham v. Goodricke*, *supra*.

There are also certain other communications which a party is generally not bound to disclose, viz. any matter, or any one of a series or chain of facts, which may tend to subject him to any pain, penalty, or forfeiture, or disability

Matter tend-
ing to subject
party to a
penalty.

in the nature of a forfeiture. See Mitford on Pleading, 307; *Lee v. Read*, 5 Beav. 381.

Communications relating to an intended fraud not privileged.

But wherever fraud, or what is equivalent to fraud, is the question in issue, the party against whom this charge is made is not entitled to shelter himself from disclosing communications that have passed between himself and his legal adviser prior to the litigation in relation to the fraud, under the plea of privilege, on the ground that it is not within the scope of a solicitor's duty to aid his client in carrying out a fraudulent intention. *Reynell v. Sprye*, 10 Beav. 51.

Discovery before the close of the pleadings without an order of judge.

Under the Judicature Act any party to a suit is entitled before the closing of the pleadings, to call upon his adversary for discovery, without an order of the judge; but the plaintiff cannot call for discovery until he has delivered his statement of claim, and the defendant cannot call for discovery until he has delivered his statement of defence.

Discovery of facts and documents.

Discovery of facts is obtained by administering interrogatories to the opposite party, and discovery of documents generally under an order requiring the opposite party to file an affidavit of documents, in the schedule to which he should state and describe all the documents which he has in his custody, or under his control, relating to the questions in issue; and in his affidavit he should state what documents, if any, he objects to being inspected by his opponent, and the grounds of his objection.

The four objections that may be made to an application for discovery.

Thus, there are four grounds for objecting to discovery. 1. That the matter in respect of which discovery is sought is immaterial to the issue. 2. That it may subject the opposite party to a penal consequence. 3. That it is a privileged communication. 4. That it relates exclusively to matter of defence.

The following are the rules and forms relating to discovery under the Judicature Act:—

ORDER XXXI.

Discovery and Inspection.

Discovery on interrogatories.

“The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than

“ the close of the pleadings, and a defendant may, at the
 “ time of delivering his defence, or at any subsequent time
 “ not later than the close of the pleadings, without any
 “ order for that purpose, and either party may at any time,
 “ by leave of the Court or a judge, deliver interrogatories
 “ in writing for the examination of the opposite party or
 “ parties, or any one or more of such parties, with a note
 “ at the foot thereof, stating which of such interrogatories
 “ each of such persons is required to answer: Provided that
 “ no party shall deliver more than one set of interrogatories
 “ to the same party without an order for that purpose.”

R. 1.

Order for Delivery of Interrogatories.

“ 18 . No. .

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Registrar in Chambers.

“ Between . . . Plaintiff,
 and
 . . . Defendant.

“ Upon hearing and upon reading the affidavit
 “ of filed the day of 18 and

“ It is ordered that the be at liberty to deliver
 “ to the interrogatories in writing, and that the
 “ said do, within days from the date of this
 “ order, answer the interrogatories in writing by affidavit,
 “ and that the costs of this application be .

“ Dated the day of 18 .”

“ The Court in adjusting the costs of the action shall at
 “ the instance of any party inquire or cause inquiry to be
 “ made into the propriety of exhibiting such interroga-
 “ tories, and if it is the opinion of the taxing master or
 “ of the Court or judge that such interrogatories have
 “ been exhibited unreasonably, vexatiously, or at improper
 “ length, the costs occasioned by the said interrogatories
 “ and the answers thereto shall be borne by the party in
 “ fault.” R. 2.

Costs occa-
 sioned by
 interroga-
 tories.

“ Interrogatories may be in the Form No. 7 in Appendix (B.) hereto, with such variations as circumstances may require.” R. 3.

Form of interrogatories.

Form of Interrogatories.

“ In the High Court of Justice. 18 . No.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between A. B. Plaintiff,

and

“ C. D., E. F. and G. H. . Defendants.

“ Interrogatories on behalf of the above-named [*plaintiff*, or *defendant* C. D.] for the examination of the above-named [*defendants* E. F. and G. H., or *plaintiff*].

“ 1. Did not, &c.

“ 2. Has not, &c.

“ [*The defendant E. F. is required to answer the interrogatories numbered .]*

“ [*The defendant G. H. is required to answer the interrogatories numbered .]*”

Corporations and other bodies.

“ If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.” R. 4.

Striking out interrogatories.

“ Any party called upon to answer interrogatories, whether by himself or by any member or officer, may, within four days after service of the interrogatories, apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant, or is not put *bonà fide* for the purposes of the action, or that the matter inquired after is not sufficiently material at that stage of the action, or on any other ground. And the

“judge, if satisfied that any interrogatory is objection-
“able, may order it to be struck out.” R. 5.

“Interrogatories shall be answered by affidavit to be
“filed within ten days, or within such other time as a
“judge may allow.” R. 6.

Time within
which to
answer inter-
rogatories.

“An affidavit in answer to interrogatories shall, unless
“otherwise ordered by a judge, if exceeding ten folios,
“be printed and may be in the Form No. 8 in Appendix (B.)
“hereto, with such variations as circumstances may re-
“quire.” R. 7.

Answer by
affidavit.

Form of Answer to Interrogatories.

“In the High Court of Justice. 18 . No. .
“Probate, Divorce and Admiralty Division.
“(Probate.)

“Between A. B. Plaintiff,
and

“C. D., E. F. and G. H. . . . Defendants.

“The answer of the above-named defendant E. F. to
“the interrogatories for his examination by the above-
“named plaintiff.

“In answer to the said interrogatories, I, the above-
“named E. F., make oath and say as follows:—”

“Any objection to answering any interrogatory may
“be taken, and the ground thereof stated in the affidavit.”
R. 8.

Objection to
answer.

“No exceptions shall be taken to any affidavit in
“answer, but the sufficiency or otherwise of any such
“affidavit objected to as insufficient shall be determined
“by the Court or a judge on motion or summons.” R. 9.

Sufficiency of
answer: how
determined.

“If any person interrogated omits to answer, or answers
“insufficiently, the party interrogating may apply to the
“Court or a judge for an order requiring him to answer,
“or to answer further, as the case may be. And an order
“may be made requiring him to answer or answer further
“either by affidavit or by *vivâ voce* examination, as the
“judge may direct.” R. 10.

Order for
answer or
further
answer.

Production of documents. “It shall be lawful for the Court or a judge at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.” R. 11.

Under this rule it has been decided that it is not competent to either party where the document in question has, with the consent of both parties, been submitted to the judge for his decision, to question that decision in a Court of Appeal. *Bustros v. White*, 1 Q. B. Div. 423—C. A.; 45 L. J., Q. B. 642.

Order for discovery. “Any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action.” R. 12.

Order for Affidavit as to Documents.

Affidavit of discovery. “In the High Court of Justice. 18 . No. .

“Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Registrar in Chambers.

“ Between . . . Plaintiff,
and . . . Defendant.

“ Upon hearing

“ It is ordered that the do, within days
“ from the date of this order, answer on affidavit stating
“ what documents are or have been in possession or
“ power relating to the matters in question in this action,
“ and that the costs of this application be .

“ Dated the day of , 18 .”

Affidavit of discovery. “The affidavit to be made by a party against whom such order as is mentioned in the last preceding Rule has been made, shall specify which, if any, of the documents therein mentioned, he objects to produce, and it may be

Form of Affidavit as to Documents.

“ (Probate.)

“ C. D. . . . Defendant.

“7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agent, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the

Notice to produce documents referred to in pleadings or affidavits.

“ documents set forth in the said first and second schedules
“ hereto.

“ Every party to an action or other proceeding shall be
“ entitled, at any time before or at the hearing thereof, by
“ notice in writing, to give notice to any other party, in
“ whose pleadings or affidavits reference is made to any
“ document, to produce such document for the inspection
“ of the party giving such notice, or of his solicitor, and to
“ permit him or them to take copies thereof; and any
“ party not complying with such notice shall not afterwards
“ be at liberty to put any such document in evidence
“ on his behalf in such action or proceeding, unless he
“ shall satisfy the Court that such document relates only
“ to his own title, he being a defendant to the action, or
“ that he had some other sufficient cause for not complying
“ with such notice.” R. 14.

Form of notice.

“ Notice to any party to produce any documents referred
“ to in his pleading or affidavits shall be in Form No. 10
“ in Appendix (B.) hereto.” R. 15.

Form of Notice to produce Documents.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ A. B. v. C. D.

“ Take notice that the [*plaintiff* or *defendant*] requires
“ you to produce for his inspection the following documents
“ referred to in your [*statement of claim, or defence,*
“ or *affidavit, dated the* *day of* A.D.].

[*Describe documents required.*]

“ X. Y.,

“ Solicitor to the

“ To Z.,

“ Solicitor for .”

Production on notice.

“ The party to whom such notice is given shall, within
“ two days from the receipt of such notice, if all the docu-

“ments therein referred to have been set forth by him in
 “such affidavit as is mentioned in Rule 13, or if any of
 “the documents referred to in such notice have not been
 “set forth by him in any such affidavit, then within four
 “days from the receipt of such notice, deliver to the party
 “giving the same a notice stating a time within three days
 “from the delivery thereof, at which the documents, or
 “such of them as he does not object to produce, may be
 “inspected at the office of his solicitor, and stating which
 “(if any) of the documents he objects to produce, and on
 “what ground. Such notice may be in the Form No. 11
 “in Appendix (B.) hereto, with such variations as circum-
 “stances may require.” R. 16.

Form of Notice to inspect Documents.

“In the High Court of Justice.

“Probate, Divorce and Admiralty Division.

“ (Probate.)

“ A. B. v. C. D.

“Take notice that you can inspect the documents men-
 “tioned in your notice of the day of A.D.
 “ [except the deed numbered in that notice] at my office
 “ on Thursday next the instant, between the hours
 “ of 12 and 4 o'clock.

“Or, that the [plaintiff or defendant] objects to giving
 “you inspection of the documents mentioned in your
 “notice of the day of A.D. , on the
 “ground that [state the ground]:—

“If the party served with notice under Rule 15 omits
 “to give such notice of a time for inspection, or objects
 “to give inspection, the party desiring it may apply to a
 “judge for an order for inspection.” R. 17.

“Every application for an order for inspection of docu-
 “ments shall be to a judge. And except in the case of
 “documents referred to in the pleadings or affidavits of the
 “party against whom the application is made, or disclosed
 “in his affidavit of documents, such application shall be
 “founded upon an affidavit showing of what documents

Order for
inspection.

Application
for inspection
to be made to
a judge.

“ inspection is sought, that the party applying is entitled
 “ to inspect them, and that they are in the possession or
 “ power of the other party.” R. 18.

Order to Produce Documents for Inspection.

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Registrar in Chambers.

“ Between Plaintiff,
 and

. Defendant.

“ Upon hearing . . . , and upon reading the affidavit
 “ of . . . , filed the . . . day of 18 . . . , and
 “ It is ordered that the . . . do, at all seasonable times, on
 “ reasonable notice, produce at the office of . . . solicitor,
 “ situate at . . . the following documents, namely
 “ and that the . . . be at liberty to inspect and peruse
 “ the documents so produced, and to take copies and
 “ abstracts thereof and extracts therefrom, at
 “ expense, and that in the meantime all further proceed-
 “ ings be stayed, and that the costs of this application
 “ be . . .

“ Dated the . . . day of . . . 18 . . .”

Decision of
 questions on
 which right
 to discovery
 depends.

“ If the party from whom discovery of any kind or
 “ inspection is sought objects to the same, or any part
 “ thereof, the Court or a judge may, if satisfied that the
 “ right to the discovery or inspection sought depends on
 “ the determination of any issue or question in dispute in
 “ the action, or that for any other reason it is desirable
 “ that any issue or question in dispute in the action should
 “ be determined before deciding upon the right to the
 “ discovery or inspection, order that such issue or question
 “ be determined first, and reserved the question as to the
 “ discovery or inspection.” R. 19.

Disobedience
 to order:
 consequences.

“ If any party fails to comply with any order to answer
 “ interrogatories, or for discovery or inspection of docu-
 “ ments, he shall be liable to attachment. He shall also,

“ if a plaintiff, be liable to have his action dismissed for want
 “ of prosecution, and, if a defendant, to have his defence,
 “ if any, struck out, and to be placed in the same position
 “ as if he had not defended, and the party interrogating may
 “ apply to the Court or a judge for an order to that effect,
 “ and an order may be made accordingly.” R. 20.

“ Service of an order for discovery or inspection made
 “ against any party on his solicitor shall be sufficient Service of
order:
attachment.
 “ service to found an application for an attachment for
 “ disobedience to the order. But the party against whom
 “ the application for an attachment is made may show in
 “ answer to the application that he has had no notice or
 “ knowledge of the order.” R. 21.

“ A solicitor upon whom an order against any party for
 “ discovery or inspection is served under the last rule, who Duty of
solicitor
served with
order.
 “ neglects without reasonable excuse to give notice thereof
 “ to his client, shall be liable to attachment.” R. 22.

“ Any party may, at the trial of an action or issue, use Use of answer
at trial.
 “ in evidence any one or more of the answers of the
 “ opposite party to interrogatories without putting in the
 “ others: provided always, that in such case the judge
 “ may look at the whole of the answers, and if he shall be
 “ of opinion that any other of them are so connected with
 “ those put in that the last-mentioned answers ought not
 “ to be used without them, he may direct them to be
 “ put in.” R. 23.

ORDER XXXVII.

Examination of Witnesses before the Trial.

“ The Court or a judge may, in any cause or matter Order for
examination
of material
witnesses in
an action
before the
trial.
 “ where it shall appear necessary for the purposes of
 “ justice, make any order for the examination upon oath
 “ before any officer of the Court, or any other person or
 “ persons, and at any place, of any witness or person,
 “ and may order any deposition so taken to be filed in
 “ the Court, and may empower any party to any such
 “ cause or matter, to give such deposition in evidence

“therein, on such terms, if any, as the Court or a judge
“may direct.” R. 4.

Order for an
examination
of a witness
residing
within the
jurisdiction of
the Court.

Where it is shown that a material witness in an action, resident within the jurisdiction of the Court, may be prevented, by illness or infirmity, from attending the trial, or that, on like grounds, his evidence is in danger of being lost by his death before the trial, the judge or registrar on summons, or the Court on motion, will make an order for his examination, so that his deposition may be taken and used at the trial in case of his unavoidable absence or death.

Commission
for the exam-
ination of a
witness
residing in
Scotland or in
Ireland;
or in India,
or in the
Colonies, or
abroad.

Where a witness is residing in Scotland or Ireland, the judge or registrar on summons, or the Court on motion, will under similar circumstances issue a commission for his examination; and where a witness is residing in India or the colonies, or abroad, the judge or registrar on summons, or the Court on motion, will in all cases, and, *without any special circumstances*, issue a commission for his examination, on the ground that the Court has no power to compel his attendance at the trial by subpœna, or otherwise. The Court will also, upon application made on motion, order a mandamus to issue under 13 Geo. III. c. 63, ss. 40—44, and 1 William IV. c. 22, s. 1, to a Court in India, or in the colonies, to summons before it and examine a material witness residing within its jurisdiction, and will also on motion issue a requisition to a Court in a foreign country to summons before it and examine a material witness residing within the jurisdiction of such foreign Court.

Mandamus for
the examina-
tion of a wit-
ness in India
or in the
Colonies.

Requisition to
a foreign
Court for the
examination
of a witness.

Recourse is had to a mandamus or requisition where a material witness is known to be, or may be supposed to be, unwilling to attend for examination before a commissioner who is without power in such countries to compel his attendance.

Objection in
practice to a
requisition.

The objection in practice to examining a witness under a requisition in a foreign Court is, that the judge generally conducts the examination of the witness himself, and

sometimes declines to put the questions suggested by the agents for the parties, either in examination in chief, or in cross-examination, or in re-examination; and that in taking the evidence he does not necessarily adhere to the rules of evidence as recognized by the law of England.

An application for an order on summons or motion, for the examination of a witness, either under an order, a commission, mandamus or requisition, should be supported by an affidavit of the applicant's solicitor, deposing that he is advised and believes that the witness named as proposed to be examined is a material and necessary witness, and that his party cannot safely proceed to trial without his evidence; and that, owing to the state of the health of the witness (or as the case may be), he cannot or may not be in attendance at the trial.

The nature of the affidavit in support of an application for the examination of a witness before the trial.

For Forms of Mandamus and Requisitions, see Chitty's Archbold, 183—185.

The following are the forms under the Judicature Acts of an order for the examination of witnesses within the jurisdiction, and of an order for a commission, and of a commission.

Order for Examination of Witnesses before Trial.

“ In the High Court of Justice.

18 . No. .

Order for examination of a witness.

“ Probate, Divorce and Admiralty Division.

“ Probate.

“ In Chambers.

“ Between Plaintiff,
and

“ Defendant.

“ Upon hearing , and upon reading the affidavit
“ of filed the day of 18 , and ,

“ It is ordered that a witness on behalf of the
“ be examined *vis à voce* (on oath or affirmation) before one
“ of the registrars of the Probate, Divorce and Admiralty
“ Division of the Supreme Court of Judicature [*or* before
“ esquire, special examiner], the solicitor or
“ agent giving to the solicitor or agent

“ notice in writing of the time and place where the examination is to take place.

“ And it is further ordered that the examination so taken be filed in the Probate Registry of the Supreme Court of Judicature, and that an office copy or copies thereof may be read and given in evidence on the trial of this cause, saving all just exceptions, without any further proof of the absence of the said witness than the affidavit of the solicitor or agent of the as to his belief, and that the costs of this application be .

“ Dated the day of 18 .”

Order for a Commission to examine Witnesses.

Order for a
commission to
examine
witnesses.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Registrar in Chambers.

“ Between . . . Plaintiff,

and

“ . . . Defendant.

“ Upon hearing , and upon reading the affidavit of , filed the day of , 18 , and ,

“ It is ordered as follows:

“ 1. A commission may issue directed to of and of commissioners named by and on behalf of the and to of commissioners named by and on behalf of the for the examination upon interrogatories and *visà voce* of witnesses on behalf of the said and respectively at aforesaid before the said commissioners, or any two of them, so that one commissioner only on each side be present and act at the examination.

“ 2. Both the said and shall be at liberty to examine upon interrogatories and *visà voce* upon the subject matter thereof or arising out of the answers thereto such witnesses as may be produced on their behalf, with liberty to the other party to cross-examine the said witnesses upon cross interrogatories and *visà*

“ *roce* on the subject matters thereof or arising out of the
“ answers thereto, the party producing the witness for
“ examination being at liberty to re-examine him *vivâ*
“ *voce*; and all such additional *vivâ voce* questions, whether
“ on examination, cross-examination, or re-examination,
“ shall be reduced into writing, and, with the answers
“ thereto, returned with the said commission.

“ 3. Within days from the date of this order, the
“ solicitors or agents of the said and shall
“ exchange the interrogatories they propose to administer
“ to their respective witnesses, and shall also within
“ days from the exchange of such interrogatories, ex-
“ change copies of the cross-interrogatories intended to
“ be administered to the said witnesses.

“ 4. days previously to the sending out of the
“ said commission, the solicitor of the said shall
“ give to the solicitor of the said notice in writing
“ of the mail or other conveyance by which the com-
“ mission is to be sent out.

“ 5. days previously to the examination of any
“ witness on behalf of the said or respectively,
“ notice in writing signed by any one of the commis-
“ sioners of the party on whose behalf the witness is to be
“ examined and stating the time and place of the intended
“ examination, and the names of the witnesses intended to
“ be examined, shall be given to the commissioners of the
“ other party by delivering the notice to them personally,
“ or by leaving it at their usual place of abode or business,
“ and if the commissioners of that party neglect to attend
“ pursuant to the notice, then one of the commissioners of
“ the party on whose behalf the notice is given shall be at
“ liberty to proceed with and take the examination of the
“ witness or witnesses *ex parte*, and adjourn any meeting
“ or meetings, or continue the same, from day to day until
“ all the witnesses intended to be examined by virtue of the
“ notice have been examined, without giving any further
“ or other notice of the subsequent meeting or meetings.

“ 6. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition, to part with the original thereof, then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present to be a true and correct copy or extract, shall be annexed to the witnesses’ deposition.

“ 7. Each witness to be examined under the commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the said commissioners or commissioner.

“ 8. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *visà voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters, to be nominated by the commissioners or commissioner, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness or witnesses, and his and their answers thereto.

“ 9. The depositions to be taken under and by virtue of the said commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken such depositions.

“ 10. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the Principal Registrar of the Probate, Divorce and Admiralty Division of the Supreme Court of Judicature on or before the day of , or such further or other day as may be ordered, enclosed in a cover under the seal or seals of the said commissioners or commissioner, and office copies thereof may be given in evidence on the trial of this action by and on behalf of

“ the said and respectively, saving all just ex-
 “ ceptions, without any other proof of the absence from this
 “ country of the witness or witnesses therein named, than
 “ an affidavit of the solicitor or agent of the said
 “ or respectively, as to his belief of the .

“ 11. The trial of this cause is to be stayed until the
 “ return of the said commission.

“ 12. The costs of this order, and of the commission to be
 “ issued in pursuance thereof, and of the interrogatories,
 “ cross-interrogatories, and depositions to be taken there-
 “ under, together with any such document, copy, or
 “ extract as aforesaid, and official copies thereof, and all
 “ other costs incidental thereto, shall be .

“ Dated the day of , 18 .”

Commission to Examine Witnesses.

“ In the High Court of Justice, 18 . No. Præcipe for
order.
 “ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between Plaintiff,

 and Defendant.

“ Seal in pursuance of order dated , a writ in the
 “ nature of a mandamus or commission to examine wit-
 “ nesses directed to .

“ Dated the day of , 18 .

 “ (Signed) .

 “ (Address) .

 “ Solicitor for the .”

Commission to Examine Witnesses.

“ In the High Court of Justice. 18 . No. Form of com-
mission to
examine
witnesses.
 “ Probate, Divorce, and Admiralty Division.

“ (Probate.)

“ Between Plaintiff,

 and Defendant.

“ Victoria, by the grace of God of the United Kingdom
 “ of Great Britain and Ireland Queen, Defender of the
 “ Faith, to of , and of commis-

“ sioners named by and on behalf of the and to
 “ of , and of commissioners named by and
 “ on behalf of the greeting: Know ye that we in
 “ confidence of your prudence and fidelity have appointed
 “ you and by these presents give you power and authority
 “ to examine on interrogatories and *vivâ voce* as hereinafter
 “ mentioned witnesses on behalf of the said and
 “ respectively at before you or any two of
 “ you, so that one commissioner only on each side be pre-
 “ sent and act at the examination.—And we command you
 “ as follows :

“ 1. Both the said and the said shall be at
 “ liberty to examine on interrogatories and *vivâ voce* on the
 “ subject-matter thereof or arising out of the answers
 “ thereto such witnesses as shall be produced on their
 “ behalf, with liberty to the other party to cross-examine
 “ the said witnesses on cross-interrogatories and *vivâ voce*
 “ on the subject-matters thereof or arising out of the
 “ answers thereto, the party producing any witness for
 “ examination being at liberty to re-examine him *vivâ voce* ;
 “ and all such additional *vivâ voce* questions, whether on
 “ examination, cross-examination, or re-examination, shall
 “ be reduced into writing, and with the answers thereto
 “ shall be returned with the said commission.

“ 2. Not less than days before the examination of
 “ any witness on behalf of either of the said parties, notice
 “ in writing, signed by any one of you, the commissioners
 “ of the party on whose behalf the witness is to be exa-
 “ mined, and stating the time and place of the intended
 “ examination and the names of the witnesses to be exa-
 “ mined, shall be given to the commissioners of the other
 “ party by delivering the notice to them, or by leaving it
 “ at their usual place of abode or business, and if the com-
 “ missioners or commissioner of that party neglect to attend
 “ pursuant to the notice, then one of you, the commis-
 “ sioners of the party on whose behalf the notice is given,
 “ shall be at liberty to proceed with and take the examina-
 “ tion of the witness or witnesses *ex parte*, and adjourn

“ any meeting or meetings, or continue the same from day
“ to day until all the witnesses intended to be examined
“ by virtue of the notice have been examined, without
“ giving any further or other notice of the subsequent
“ meeting or meetings.

“ 3. In the event of any witness on his examination,
“ cross-examination, or re-examination producing any book,
“ document, letter, paper, or writing, and refusing for
“ good cause to be stated in his deposition to part with the
“ original thereof, then a copy thereof, or extract therefrom,
“ certified by the commissioners or commissioner present
“ and acting to be a true and correct copy or extract shall
“ be annexed to the witnesses’ deposition.

“ 4. Each witness to be examined under this commis-
“ sion shall be examined on oath, affirmation, or otherwise
“ in accordance with his religion by or before the commis-
“ sioners or commissioner present at the examination.

“ 5. If any one or more of the witnesses do not under-
“ stand the English language (the interrogatories, cross-
“ interrogatories, and *vis à voce* questions, if any, being
“ previously translated into the language with which he
“ or they is or are conversant), then the examination shall
“ be taken in English through the medium of an inter-
“ preter or interpreters to be nominated by the commis-
“ sioners or commissioner present at the examination, and
“ to be previously sworn according to his or their several
“ religions by or before the said commissioners or com-
“ missioner truly to interpret the questions to be put to
“ the witness and his answers thereto.

“ 6. The depositions to be taken under this commission
“ shall be subscribed by the witness or witnesses, and by
“ the commissioners or commissioner who shall have taken
“ the depositions.

“ 7. The interrogatories, cross-interrogatories, and de-
“ positions, together with any documents referred to
“ therein, or certified copies thereof or extracts therefrom,
“ shall be sent to the senior Registrar of the Principal
“ Registry of the Probate, Divorce and Admiralty Division

“ of the Supreme Court of Judicature on or before the
 “ day of enclosed in a cover under the seals
 “ or seal of the commissioners or commissioner.

“ 8. Before you, or any of you, in any manner act in
 “ the execution hereof you shall severally take the oath
 “ hereon indorsed on the Holy Evangelists or otherwise
 “ in such other manner as is sanctioned by the form of
 “ your several religions and is considered by you respec-
 “ tively to be binding on your respective consciences.

“ And we give you, or any one of you, authority to
 “ administer such oath to the others or others of you.

“ Witness, Hugh MacCalmont, Earl Cairns, Lord High
 “ Chancellor of Great Britain, the day of in
 “ the year of our Lord one thousand eight hundred
 “ and .”

“ This writ was issued by of , agent for
 “ of solicitor for the , who reside
 “ at .”

Witnesses' Oath.

“ You are true answer to make to all such questions as
 “ shall be asked you, without favour or affection to either
 “ party, and therein you shall speak the truth, the whole
 “ truth, and nothing but the truth. So help you God.”

Commissioners' Oath.

“ You shall, according to the best of your skill and
 “ knowledge, truly and faithfully, and without partiality
 “ to any or either of the parties in this cause, take the
 “ examinations and depositions of all and every witness
 “ and witnesses produced and examined by virtue of the
 “ commission within written. So help you God.”

Interpreter's Oath.

“ You shall truly and faithfully, and without partiality
 “ to any or either of the parties in this cause, and to the
 “ best of your ability, interpret and translate the oath or
 “ oaths, affirmation or affirmations which shall be adminis-
 “ tered to, and all and every the questions which shall be
 “ exhibited or put to, all and every witness and witnesses

“ produced before and examined by the commissioners
 “ named in the commission within written, as far forth as
 “ you are directed and employed by the said commis-
 “ sioners to interpret and translate the same out of the
 “ English into the language of such witness or witnesses,
 “ and also in like manner to interpret and translate the
 “ respective depositions taken and made to such questions
 “ out of the language of such witness or witnesses into the
 “ English language. So help you God.”

Clerk's Oath.

“ You shall truly, faithfully, and without partiality to
 “ any or either of the parties in this cause, take, write
 “ down, transcribe, and engross all and every the questions
 “ which shall be exhibited or put to all and every witness
 “ and witnesses, and also the depositions of all and every
 “ such witness and witnesses produced before and examined
 “ by the said commissioners named in the commission
 “ within written, as far forth as you are directed and em-
 “ ployed by the commissioners to take, write down, trans-
 “ scribe or engross the said questions and depositions.
 “ So help you God.”

Direction of interrogatories, &c. when returned by the commissioners:—

“ The senior Registrar of the Principal Registry of the
 “ Probate, Divorce and Admiralty Division of the High
 “ Court of Justice.

“ The Probate Registry, Somerset House, London.”

Habeas Corpus ad Testificandum.

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between Plaintiff,

and

“ Defendant.

“ Victoria by the grace of God of the United Kingdom

“ of Great Britain and Ireland Queen, Defender of the
 “ Faith, to the [keeper of our prison at]:

“ We command you that you bring , who it is
 “ said is detained in our prison under your custody ,
 “ before at on day the day of
 “ at the hour of in the noon, and so
 “ from day to day until the above action is tried, to give
 “ evidence on behalf of the . And that immediately
 “ after the said shall have so given his evidence you
 “ safely conduct him to the prison from which he shall
 “ have been brought.

“ Witness, Hugh MacCalmont, Earl Cairns, Lord High
 “ Chancellor of Great Britain, the day of in
 “ the year of our Lord one thousand eight hundred and
 “ .

“ This writ was issued by of agent for
 “ of, solicitor for the , who reside at .”

Administration Pendente Lite, and Receiver of Real Estate.

Adminis-
 trator pen-
 dente lite.

Receiver of
 real estate.

The Court has power to appoint an administrator *pendente lite* in a probate or administration action, or in an action for the revocation of probate or of letters of administration (see sect. 70 of Court of Probate Act, 1857); and it has also power to appoint the same person, or another person, receiver of the real estate in any probate action, or in any action for the revocation of probate, when the will in question disposes of real estate, and in which the heir-at-law or devisee, or other person pretending an interest in the real estate, has been cited, or is a party to the action, in respect of the real estate. *Purdey v. Field*, 3 S. & T. 576; 33 L. J. 73.

As to the appointment of an administrator *pendente lite*, see sect. 70 of the Court of Probate Act, 1857:—

Administra-
 tion pendente
 lite.

“ Pending any suit touching the validity of the will of
 “ any deceased person, or for obtaining, recalling, or re-
 “ voking any probate, or any grant of administration, the
 “ Court of Probate may appoint an administrator of the
 “ personal estate of such deceased person; and the adminis-

“trator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court, and act under its direction.” S. 70.

As to the appointment of a receiver of the real estate, see sect. 71 of the Court of Probate Act, 1857:—

“It shall be lawful for the Court of Probate to appoint any administrator, appointed as aforesaid, or any other person, to be receiver of the real estate of any deceased person, pending any suit in the Court touching the validity of any will of such deceased person, by which his real estate may be affected; and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the Court may direct.” S. 71.

Receiver of
real estate
pendente lite.

Applications for the appointment of an administrator *pendente lite*, or a receiver of real estate, are made in the first instance to the Court on motion, and the application should be supported by an affidavit of the applicant, or of his agent, stating the nature and value of the personal or real estate left by the deceased, and showing that there is some object or necessity in an administrator or receiver being appointed pending the action: *e.g.* for the preservation or protection of the deceased's property; for the receipt and investment of rents, &c.; for the payment of debts and interest on mortgages, &c. The practice of the Probate Court is assimilated to the practice of the Court of Chancery in appointing a receiver, and the general rule is, that, whenever there is a suit pending, an administrator *pendente lite* will, on application, be appointed, irrespective of the condition of the estate, or of the person who has actual possession of it. *Bellew v. Bellew*, 4 S. & T. 58; 34 L. J. 125.

Applications
for the ap-
pointment of
an adminis-
trator pen-
dente lite, and
of a receiver
made on
motion.

Practice of
Probate Court
assimilated to
that of
Chancery.

Some exceptions have been made to this rule.

Thus, where the deceased's property was invested in a farming business, which he had carried on in partnership with his brother, who was continuing it, the Court declined

Cases where
the Court has
declined to
appoint an

administrator
pendente lite. to appoint an administrator *pendente lite*, the brother, who was a party to the suit, opposing, as there was no sufficient evidence that he was wasting the estate. *Horrell v. Witts*, 1 L. R. 103; 35 L. J. 55.

Lord Penzance, in that case, said: "The only result of making a grant of administration *pendente lite* now would be the appointment of some person to wrangle with the surviving partner as to the management of the farm. When one out of four or five partners in a commercial firm dies, the Court does not thrust a stranger to the business into the partnership, to represent the interest of the deceased partner. The same rule is applicable to a farming business. I do not say that an extreme case might not arise, in which the Court would interfere to prevent the destruction of property which had been held in partnership. At present the case is not strong enough to induce the Court to interfere; and I reject the motion."

So, also, where a suit was pending to try the validity of a codicil only, which did not affect the appointment contained in the will of the executor, the Court rejected, with costs, a motion for the appointment of an administrator *pendente lite*, on the ground that the executor was clothed with power, and was the proper person to administer the estate. *Mortimer v. Paul*, 2 L. R. 85; 39 L. J. 47.

Appointment
of adminis-
trator pen-
dente lite on
the applica-
tion of a per-
son not a
party to the
suit.

The Court has appointed an administrator *pendente lite* on the application of a person not a party to the suit. Thus, in a contested suit, which was likely to be protracted, the Court, on the application of a creditor, who was not a party to the suit, appointed a person—who had been appointed receiver of the estate in the Court of Chancery—as administrator *pendente lite*, in order to enable the creditor to obtain payment of his debts. *Tichborne v. Tichborne*, 1 L. R. 730; 39 L. J. 22.

Where the parties on the motion do not consent to the appointment of any particular person as the administrator or receiver, the practice is for the Court to refer the matter to the registrar to appoint some indifferent person.

A party unconnected with the suit is the most proper person to be appointed (*De Chatehain v. Pontigny*, 1 S. & T. 34; 27 L. J. 18); and the rule is that a party to a suit is never appointed unless all parties consent.

An administrator pendente lite is merely an officer of the Court; his administration is to be under the direction of the Court to represent the deceased. *In the goods of Graves*, 1 Hagg. 313.

In *Charlton v. Hindmarsh* (1 S. & T. 519), the Court directed that he should not discharge claims on the deceased's estate until they had passed before the registrar. But the Court will not interfere with an order made by the Chancery Division on him in reference to the sale or management of the property. *Tichborne v. Tichborne*, 2 L. R. 41; 39 L. J. 22.

“The Court of Probate may direct that administrators
“and receivers appointed pending suits involving matters
“and causes testamentary, shall receive out of the personal
“and real estate of the deceased such reasonable remunera-
“tion as the Court think fit.” The Court of Probate
Act, 1857, s. 72.

Remunera-
tion to admi-
nistrators
pendente lite
and receivers.

The administrator pendente lite and receiver hold the property only until the suit terminates, and he is then bound, and the Court will compel him, to pay all that he has received to the person pronounced by the Court to be entitled. *Charlton v. Hindmarsh*, 1 S. & T. 519.

The Court generally requires security from the administrator pendente lite. In *Charlton v. Hindmarsh*, security to the amount of one year's income was required.

Oath of Administrator Pendente Lite to lead the Grant.

“In the High Court of Justice.

“Probate, Divorce and Admiralty Division.

“ (Probate).

“The Probate Registry.

“In the goods of A. B., widow, deceased.

“I, C. D., of make oath and say, that the said
“A. B., late of , widow, deceased, died at on

“ the day of , having as asserted made her
 “ will, bearing date the day of , but did not
 “ thereof appoint any executor :

“ And I further say, that there is now depending in
 “ judgment in the aforesaid division a certain action or
 “ suit instituted by E. F., the residuary legatee named in
 “ the same will, against me the said C. D., one of the
 “ natural and lawful children and one of the next of kin of
 “ the said deceased, touching and concerning the validity
 “ of the said will :

“ And I further make oath, that the right honorable
 “ the president of the aforesaid division did, on the
 “ day of , after hearing counsel for all parties, upon
 “ the consent of the other party to the said suit, decree
 “ letters of administration pending the said suit of all
 “ and singular the personal estate and effects of the said
 “ deceased to be granted to me this deponent :

“ And I further make oath, that I will faithfully ad-
 “ minister the personal estate and effects of the said
 “ deceased pending the said suit, save distributing the
 “ residue thereof, under the directions and control of this
 “ Court ; that I will exhibit a true and perfect inventory
 “ of all and singular the said estate and effects, and render
 “ a just and true account thereof whenever required by
 “ law so to do ; and that the whole of the personal estate
 “ and effects of the said deceased does not amount in value
 “ to the sum of pounds to the best of my knowledge,
 “ information and belief.

“ Sworn at this }
 “ day of 18 , } “ (Signed) C. D.”
 “ before me,

The Court of
 Probate may
 require
 security from
 a receiver of
 real estate.

By section 21 of the Court of Probate Act, 1858, it is
 provided, that “it shall be lawful for the Court of Probate
 “ to require security by bond, in such form as by any
 “ rules and orders shall from time to time be directed,
 “ with or without sureties, from any receiver of the real
 “ estate of any deceased person appointed by the said Court,
 “ under section 71 of the Court of Probate Act ; and

“ the Court may, on application, made on motion or in a
 “ summary way, order one of the registrars of the Court
 “ to assign the same to some person to be named in such
 “ order ; and such person, his executors or administrators,
 “ shall thereupon be entitled to sue on the said security,
 “ or put the same in force in his or their own name or
 “ names, both at law and in equity, as if the same had
 “ been originally given to him instead of to the judge of
 “ the said Court, and shall be entitled to recover thereon,
 “ as trustee for all persons interested, the full amount due
 “ in virtue thereof.” S. 21.

“ A receiver of real estate pending suit is to give bond
 “ in the form given No. 29, or in a form as near thereto as
 “ the circumstances of the case will admit of, with two
 “ sureties, and in a penalty of such amount as may be
 “ directed by the judge.” R. 79, C. B.

The following is the form of bond:—

Bond to be executed by a Receiver of Real Estate pending Suit.

“ Know all men by these presents, that we, A. B. of Form of Bond
by a receiver
of real estate.
 “ , C. D. of , and E. F. of , are jointly
 “ and severally bound unto the Right Honorable ,
 “ the President of the Probate, Divorce and Admiralty
 “ Division of the Supreme Court of Judicature, in the sum
 “ of pounds of good and lawful money of Great
 “ Britain, to be paid to the President for the time being
 “ of the said division, for which payment well and truly
 “ to be made we bind ourselves and every of us for the
 “ whole, our heirs, executors and administrators, firmly by
 “ these presents. Sealed with our seals. Dated the
 “ day of in the year of our Lord one thousand
 “ eight hundred and :

“ Whereas G. H., late of , died on the day
 “ of , 18 , at , having as asserted made and
 “ duly executed { his } last will and testament, with
 “ { her }
 “ codicil thereto, bearing date respectively the [here

“ *insert dates of the testamentary papers*]: And whereas
“ there is now pending in judgment in the Probate,
“ Divorce and Admiralty Division of the Supreme Court
“ of Judicature a certain cause or action instituted by I. J.,
“ as one of the executors named in the said will, against
“ K. L., the natural and lawful and only next of
“ kin of the said deceased, touching and concerning the
“ validity of the said will and codicil, in which said cause
“ or suit M. N., as the heir-at-law of the said G. H., has
“ been cited to see proceedings, and has entered an appear-
“ ance, and become a party to the said cause or action :
“ And whereas the Right Honorable , the President
“ aforesaid, did, on the day of 18 , after hearing
“ counsel for and on behalf of all parties to the said cause
“ or suit, appoint the above-bounden A. B. as and to be
“ receiver of the real estate of the said G. H. pending the
“ said cause or suit :

“ Now the condition of this obligation is such that if
“ the above-bounden A. B., the receiver of the real estate
“ of the said G. H., pending the aforesaid cause or action
“ do make a true and perfect inventory of all the rents,
“ issues and profits of the said real estate which have or
“ shall come to his hands, possession or knowledge, or into
“ the hands, possession or knowledge of any other person
“ for him, and the same so made do exhibit, or cause to
“ be exhibited, into the principal registry of the Probate,
“ Divorce and Admiralty Division of the Supreme Court
“ of Judicature, when lawfully required so to do, and
“ the same rents, issues and profits, do well and truly pay
“ and appropriate according to law, that is to say, in
“ payment and satisfaction of all charges and expenses
“ which are or may be or become legally charged upon
“ and payable out of the said rents, issues and profits,
“ and in the letting and managing the said real estate,
“ and performing other the duties committed to him by
“ the judge aforesaid, and further do make or cause to be
“ made a true and just account of his administration of the
“ said rents, issues and profits, which shall be allowed by

“ the said Court, and all the rest and residue of the said
 “ rents, issues and profits, do deliver and pay under the
 “ direction of the said Court, then this obligation to be
 “ void and of none effect, or else to remain in full force
 “ and virtue.

“ (Signed) A. B. (L.S.)

“ C. D. (L.S.)

“ E. F. (L.S.)

“ Signed, sealed and delivered by the within-named
 “ in the presence of P. Q., a clerk in the principal registry,
 “ or a commissioner or surrogate authorized to administer
 “ oaths in the Court of Probate.”

The sureties to the bond are by the practice required to
 justify.

Affidavit of Justification of Sureties.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ The Principal Registry.

“ In the goods of A. B., deceased.

Affidavit of
 justification
 of sureties.

“ We, C. D. of , and E. F. of , jointly and
 “ severally make oath [*or* solemnly, sincerely and truly
 “ declare and affirm, according to the form of words
 “ prescribed by the statute applicable to the particular case]
 “ that we are the proposed sureties on behalf of G. H.,
 “ the intended administrator of all and singular the personal
 “ estate and effects of the said A. B., late of deceased,
 “ in the penal sum of pounds, for his faithful ad-
 “ ministration of the said personal estate and effects of the
 “ said deceased; and I the said C. D. for myself further
 “ make oath [*or* as before] that I am, after payment of
 “ all my just debts, well and truly worth in real and
 “ personal estate the sum of : and I the said E. F.
 “ for myself further make oath [*or* as before] that I am,

T.

Q

“ after payment of all my just debts, well and truly worth
 “ in real and personal estate the sum of pounds.

“ Sworn by the said C. D. }
 “ and E. F. at on the “ (Signed) C. D.
 “ day of 18 , “ E. F.”
 “ before me , }

“ In contentious business, inventories, and not merely
 “ declarations, of the personal estate and effects of the
 “ deceased are to be filed, unless by order of the judge or
 “ of a registrar. The form of inventory is given, No. 27.”
 R. 76, C. B.

*Declaration of the Personal Estate and Effects of a Testator
 or an Intestate.*

Declaration of “ In the High Court of Justice.
 personal “
 estate. “ Probate, Divorce and Admiralty Division.

“ (Probate).

“ The Principal Registry.

“ In the goods of A. B., deceased.

“ A true declaration of all and singular the personal
 “ estate and effects of A. B., late of deceased, who
 “ died on the day of 18 , at , which
 “ have at any time since his death come to the hands,
 “ possession or knowledge of C. D., the intended adminis-
 “ trator of the said estate and effects [*or* intended adminis-
 “ trator with the will annexed, *or* executor, *as the case may*
 “ *be*] of the said A. B., deceased, made and exhibited
 “ upon and by virtue of the corporal oath [*or* solemn
 “ affirmation] of the said C. D., follows, to wit:—

£ s. d.

“ First, this declarant declares that the said
 “ deceased was at the time of his death possessed of
 “ or entitled to certain household goods and furni-
 “ ture, plate, linen and china, in and about his
 “ dwelling-house situate at in the county of
 “ , which have since his death been valued

£ s. d.

“ and appraised by E. F. of , licensed ap-
 “ praiser, at the sum of pounds shillings
 “ and pence.

“ Second, this declarant declares that the said
 “ deceased was at the time of his death possessed of
 “ or entitled to a sum of pounds shillings
 “ and pence, now in the hands of his bankers, the
 “ London and Westminster Bank. . . .

“ Third, this declarant declares that the said
 “ deceased was at the time of his death possessed of
 “ or entitled to a certain leasehold dwelling-house
 “ situate at , held by him under a lease for
 “ ninety-nine years, at a rental of pounds
 “ per annum. At the time of the death of
 “ the said deceased there still remained unexpired
 “ of the said term of ninety-nine years a period of
 “ thirty years; and the said leasehold dwelling-
 “ house is valued at the sum of pounds
 “ shillings and pence

Total . . £

“ [*Where leasehold estates are described briefly, it will be
 “ necessary to state, as in the case of the first item, that they
 “ have been valued by a licensed appraiser. But if they are
 “ described particularly, the valuation will not be required.
 “ All other property should be sufficiently described to identify
 “ it in a similar form to the items set out.*]

“ Lastly, this statement saith, that no personal estate or
 “ effects of or belonging to the said deceased have at any
 “ time since his death, come to the hands, possession or
 “ knowledge of this declarant save as is hereinbefore set
 “ forth.

“ Sworn at

“ on the day of , } “ (Signed) C. D.”
 “ 18 , before me, . }

Accounts of Administrator and Receiver pending Suit.

“ Every administrator *pendente lite* and receiver of real
 “ estate shall exhibit an inventory and render an account
 “ of the property of the deceased which comes to his
 “ hands, and the accounts of every such administrator and
 “ receiver shall be referred to the registrars of the prin-
 “ cipal registry for investigation and report, before the
 “ same are allowed by the court, unless the judge shall
 “ otherwise direct; and the foregoing rules and orders
 “ respecting the taxation of costs shall, so far as the same
 “ are applicable, be observed with respect to the investiga-
 “ tion of such accounts, and any other accounts referred
 “ to the registrars for examination.” R. 96, C. B.

Inventory.

“ 18 [here put the letter and number].

Form of
inventory.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ The Principal Registry.

“ Between E. F. Plaintiff,

“ and

“ C. D. Defendant.

“ In the goods of A. B., deceased.

“ A true, full and particular inventory of all and
 “ singular the personal estate and effects of A. B., late of
 “ , deceased, which have at any time since his
 “ death come to the hands, possession or knowledge of
 “ C. D., the sole executor of the last will and testament of
 “ the said deceased [*or* administrator of the said personal
 “ estate and effects of the said deceased, *as the case may*
 “ *be*], made and exhibited upon and by virtue of the
 “ corporal oath [*or* solemn affirmation] of the said C. D.,
 “ follows, to wit:— £ s. d.

“ First, this exhibitant saith that the said deceased
 “ was at the time of his death possessed of or

“ entitled to certain household goods and furni-
 “ ture, plate and jewellery, in and about his
 “ dwelling-house situate at , which have
 “ since his death been valued and appraised by
 “ of , licensed appraiser, at the
 “ sum of pounds, shillings, and
 “ pence

“ Second, this exhibitant saith that the said de-
 “ ceased was at the time of his death possessed of
 “ or entitled to a leasehold messuage or dwelling-
 “ house and premises situate at , of the lease
 “ whereof at the time of his death years
 “ remained unexpired, and for which the said
 “ deceased paid a yearly rental of £, and
 “ that the said messuage and premises have been
 “ valued and appraised by the said at the
 “ sum of pounds, shillings, and
 “ pence

“ Third, this exhibitant saith that the said de-
 “ ceased was at the time of his death possessed of
 “ or entitled to the sum of pounds
 “ shillings, and pence in the hands of his
 “ bankers the London and County Bank

“ Fourth, this exhibitant saith that the said de-
 “ ceased was at the time of his death possessed of
 “ or entitled to the sum of £. of the preference
 “ stock of the Great Western Railway Company,
 “ which sum is of the value of pounds,
 “ shillings, and pence

Total . . . £

“ Lastly, this exhibitant saith, that no personal estate
 “ or effects of or belonging to the said deceased have at
 “ any time since his death come to the hands, possession
 “ or knowledge of this exhibitant, save as is hereinbefore
 “ set forth. “ (Signed) C. D.

“ On the day of , 18 , the said C. D.
 “ was duly sworn to [*or solemnly sincerely and truly*
 “ declared and affirmed] the truth of the above inventory,
 “ at .

“ Before me,
 “ Person authorized to administer oaths under the act.”

Paying Money out of Court.

Requirements
 as to notice
 for payment
 of money out
 of registry.

“ Persons applying for payment of money out of the
 “ registry must give forty-eight hours’ notice of such appli-
 “ cation to the clerk of the papers. Such notice is to be
 “ in writing, and to set forth the day on which the money
 “ applied for was paid into the registry—the minute entered
 “ on receiving the same—the date and particulars of the
 “ order for payment to the applicant—and if the same be
 “ in payment of costs, the date of filing the bill for taxa-
 “ tion and of the registrar’s certificate. During the sum-
 “ mer vacation money can only be paid out on certain days
 “ to be fixed by the registrars, notice whereof will be given
 “ in the registry.” R. 97, C. B.

ORDER LII.

*Interlocutory Orders, Interim Preservation of
 Property, &c.*

Orders for
 the preserva-
 tion of pro-
 perty the
 subject of
 a suit.

“ When by any contract a *prima facie* case of liability is
 “ established, and there is alleged as matter of defence
 “ a right to be relieved wholly or partially from such
 “ liability, the Court or a judge may make an order for
 “ the preservation or interim custody of the subject-matter
 “ of the litigation, or may order that the amount in dispute
 “ be brought into Court or otherwise secured.” R. 1.

Orders for
 the sale of
 perishable
 property
 subject of
 a suit.

“ It shall be lawful for the Court or a judge, on the
 “ application of any party to any action, to make any order
 “ for the sale, by any person or persons named in such
 “ order, and in such manner, and on such terms as to the
 “ Court or judge may seem desirable, of any goods, wares,
 “ or merchandise which may be of a perishable nature or

“likely to injure from keeping, or which for any other
 “just and sufficient reason it may be desirable to have
 “sold at once.” R. 2.

“It shall be lawful for the Court or a judge, upon the
 “application of any party to an action, and upon such
 “terms as may seem just, to make any order for the deten-
 “tion, preservation, or inspection of any property, being the
 “subject of such action, and for all or any of the purposes
 “aforesaid to authorise any person or persons to enter upon
 “or into any land or building in the possession of any party
 “to such action, and for all or any of the purposes afore-
 “said to authorise any samples to be taken, or any obser-
 “vation to be made or experiment to be tried, which may
 “seem necessary or expedient for the purpose of obtaining
 “full information or evidence.” R. 3.

Orders for
the detention,
preservation
or inspection
of property
the subject
of an action.

“An application for an order under Rule 1 may be
 “made by the plaintiff at any time after his right thereto
 “appears from the pleadings; or, if there be no pleadings,
 “is made to appear by affidavit or otherwise to the satisfac-
 “tion of the Court or a judge.” R. 5.

Time for
making
application
under R. 1.

Mandamus and Injunction.

“A mandamus or an injunction may be granted, or a re-
 “ceiver appointed, by an interlocutory order of the Court in
 “all cases in which it shall appear to the Court to be just or
 “convenient that such order should be made; and any such
 “order may be made either unconditionally or upon such
 “terms and conditions as the Court shall think just; and
 “if an injunction is asked either before or at or after the
 “hearing of any cause or matter, to prevent any threatened
 “or apprehended waste or trespass, such injunction may be
 “granted if the Court shall think fit, whether the person
 “against whom such injunction is sought is or is not in
 “possession under any claim of title or otherwise, or (if out
 “of possession) does or does not claim a right to do the act
 “sought to be restrained under any colour of title; and
 “whether the estates claimed by both or by either of the
 “parties are legal or equitable.” Sub-sect. 8 of sect. 25

Mandamus
and injunc-
tion, when to
be granted.

of the Judicature Act, 1873; *Mandamus*—*Glossop v. Heslon Local Government Board*, 12 Ch. Div. 122; *Injunction*—*Nicholas v. Dracachis*, 1 P. Div. 72; 45 L. J. 45.

“An application for an order under section twenty-five, sub-section eight of the Act, or under rules two or three of this Order, may be made to the Court or a judge by any party. If the application be by the plaintiff for an order under the said sub-section eight, it may be made either *ex parte* or with notice, and if for an order under the said Rules two or three of this Order, it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application.” R. 4.

Writ of
injunction
abolished.

“No writ of injunction shall be issued. An injunction shall be by a judgment order, and such judgment or order shall have the effect which a writ of injunction previously had.” R. 8.

Præcipe for a Prohibition.

“18 . . . No. .

“In the High Court of Justice.

“Probate, Divorce and Admiralty Division.

“(Probate.)

“In the matter of a certain . . . now depending in the Court.

“Between . . . Plaintiff,

“and

“ . . . Defendant.

“Seal a writ of prohibition directed to the judge of the above-named Court, and to the above-named plaintiff, to prohibit them from further proceeding in the said .

“Dated the . . . day of . . . 18 .

“(Signed) .

“(Address) .

“Solicitor for the .”

Prohibition.

“ In the High Court of Justice. 18 . . No. .

“ Probate, Divorce, and Admiralty Division.

“ (Probate).

“ Between Plaintiff,

“ and

“ Defendant.

“ Victoria, by the grace of God of the United Kingdom

“ of Great Britain and Ireland Queen, Defender of the

“ Faith, to the [judge of the Court holden at]

“ and to [*name of plaintiff*] of greeting:

“ Whereas we have been given to understand that you
 “ the said have [entered a plaint against] C. D. in
 “ the said Court, and that the said Court has no jurisdic-
 “ tion in the said [cause] or to hear and determine the said
 “ [plaint] by reason that [*state facts showing want of juris-*
 “ *diction*]:

“ We therefore hereby prohibit you from further pro-
 “ ceeding in the said [action] in the said Court.

“ Witness, Hugh MacCalmont, Earl Cairns, Lord High
 “ Chancellor of Great Britain, the day of in
 “ the year of our Lord 18 .

“ This writ was issued by of agent for
 “ of solicitor for the who reside at .”

Mandamus.

“ In the High Court of Justice. 18 . . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between Plaintiff,

“ and

“ Defendant.

“ Seal in pursuance of order dated a writ of man-
 “ damus directed to commanding to return-
 “ able .

“ Dated the day of 18 .

“ (Signed) .

“ (Address) .

“ Solicitor for the .”

CHAPTER XIII.

QUESTIONS OF LAW—SPECIAL CASES—MODES OF TRIAL—
 HEIR AT LAW—DISCRETION OF JUDGE AS TO MODE OF
 TRIAL—JURISDICTIONS OF COUNTY COURTS—ADMISSIONS—
 FORMS OF SUBPŒNAS—ORAL EVIDENCE—LOST WILL—
 EVIDENCE BY AFFIDAVIT—RULES AS TO AFFIDAVITS—
 PROBATE MADE EVIDENCE BY NOTICE—MOTION FOR JUDG-
 MENT—ENTRY OF JUDGMENT—COSTS—RULES OF PRERO-
 GATIVE AND PROBATE COURTS AS TO COSTS—COSTS AGAINST
 PERSONS SUING IN FORMA PAUPERIS—SECURITY FOR
 COSTS.

QUESTIONS of law that have not been decided on demurrer
 may be decided either on a special case stated by the
 parties, or on the pleadings and evidence at the hearing.

ORDER XXXIV.

Questions of Law—Special Cases.

Form of
 special case.

“The parties may, after the writ of summons has
 “been issued, concur in stating the questions of law arising
 “in the action in the form of a special case for the opinion
 “of the Court. Every such special case shall be divided
 “into paragraphs numbered consecutively, and shall con-
 “cisely state such facts and documents as may be neces-
 “sary to enable the Court to decide the questions raised
 “thereby. Upon the argument of such case the Court
 “and the parties shall be at liberty to refer to the whole
 “contents of such documents, and the Court shall be at
 “liberty to draw from the facts and documents stated in
 “any such special case any inference, whether of fact or
 “law, which might have been drawn therefrom if proved
 “at a trial.” R. 1.

Inference of
 fact and law.

Preliminary
 question of
 law ordered to
 be raised by
 judge by
 special case or
 otherwise.

“If it appear to the Court or a judge, either from the
 “statement of claim or defence or reply or otherwise, that
 “there is in any action a question of law, which it would
 “be convenient to have decided before any evidence is
 “given or any question or issue of fact is tried, the Court
 “or judge may make an order accordingly, and may

“direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.” R. 2.

“Every special case shall be printed by the plaintiff, and signed by the several parties or their solicitors, and shall be filed by the plaintiff. Printed copies for the use of the judges shall be delivered by the plaintiff.” R. 3.

Printing
special case.

“No special case in an action to which a married woman, infant, or person of unsound mind is a party shall be set down for argument without leave of the Court or a judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true.” R. 4.

Persons under
disability.

“Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 13 in Appendix (B.) hereto, and also if any married woman, infant, or person of unsound mind be a party to the action, producing a copy of the order giving leave to enter the same for argument.” R. 5.

Entry of
special case
for argument.

Setting down Special Case.

“In the High Court of Justice. 18 . B. No.

“Probate, Divorce and Admiralty Division.

“ (Probate.)

“Between A. B. Plaintiff,

“and

“C. D. and others Defendants.

“Set down for argument the special case filed in this action on the . . . day of . . . , 18 .

“X. Y., Solicitor for”

Questions of law, raised in actions in the Probate Court, are decided by the Court; questions of fact, by the Court with or without the assistance of a jury, or at the assizes.

Actions to be tried before a judge or judges, or a judge and jury.

By Order XXXVI. r. 2, "Actions shall be tried and heard either before a judge or judges, or before a judge and jury," giving either party an absolute right to have issues of fact tried by a jury, subject to the qualification contained in Order XXXVI. r. 26: "The Court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury." By the qualification contained in the last rule it is still in the discretion of the judge of the Probate Division, in conformity with the practice of the Court of Probate, to determine whether questions of fact shall be tried by the Court or a jury, except where the heir-at-law is a party to the action and insists, as he is entitled, upon having the issues of fact tried by a jury.

The heir-at-law may, if right, have issues of fact tried by a jury.

See Sect. 35 of the Court of Probate Act, 1857: "It shall be lawful for the Court of Probate to cause any questions of fact arising in any suit or proceeding under this Act to be tried by a special or common jury before the Court itself, or by means of an issue to be directed to any of the superior Courts of common law, in the same manner as an issue may now be directed by the Court of Chancery, and such question shall be so tried by a jury in any case where an heir-at-law, cited or otherwise made party to the suit or proceeding, makes application to the Court of Probate for that purpose; and in any other case where all the parties to the suit or proceeding concur in such an application, and where any party or parties other than such heir-at-law make a like application (the other party or parties not concurring therein), and the Court shall refuse to cause such question to be tried by a jury, such refusal of the Court shall be subject to appeal as herein provided." The Court of Probate Act, 1857, sect. 35.

"Any person considering himself aggrieved by any final or interlocutory decree or order of the Court of Probate

“ may appeal therefrom to the House of Lords : provided
 “ always, that no appeal from any interlocutory order of
 “ the Court of Probate shall be made without leave of the
 “ Court of Probate first obtained, but on the hearing of an
 “ appeal from any final decree, all interlocutory orders com-
 “ plained of shall be considered as under appeal as well as
 “ the final decree.” Court of Probate Act, 1857, sect. 39.

In other cases it is within the discretion of the Court to direct questions of fact to be tried with or without a jury. Sect. 35, Probate Act, 1857. Where the only issue raised is as to the due execution of the will, the Court invariably directs the cause to be tried without a jury. Where the issues raised are testamentary capacity, undue influence, or fraud, it is the practice of the Court, on application made by either party, to grant a jury. But where the cause, from the nature of the issues of fact raised, is a more proper one to be tried before the Court itself, than by a jury, it will on application of either party be directed to be tried without a jury, unless such application is opposed by the heir-at-law. Thus, where the plaintiff propounded the contents of a lost will as universal legatee, and the defendants pleaded that the contents were not those alleged, the plaintiff's application for a jury was refused. *Quick v. Quick and another*, 3 S. & T. 460 ; 33 L. J. 108. So, also, where the main question to be decided being one of mixed law and fact, the presumptive revocation of a will, a jury was refused. *Smith v. Hoad and others*, 3 S. & T. 462. And where any of the parties to a suit, other than the heir-at-law, apply for a jury, and the Court refuses one, such refusal is, with the leave of the Court, subject to an appeal. Sects. 35 and 39, the Court of Probate Act, 1857. Where the final decree is appealed, such refusal might also be considered under appeal, as well as the final decree. Sect. 39, the Court of Probate Act, 1857.

Where a jury not claimed by heir-at-law, the mode of trial is in discretion of judge.

Discretion, how to be exercised.

By sect. 38, when the Court directed an issue, it was lawful for it to direct such issue to be tried either before a judge of assize in any county, or at the sittings for the trial of causes in London or Middlesex, and either by a special

or common jury, but not by a judge of assize without a jury (*Bushell v. Blenkhorn*, 1 L. R. 89; 35 L. J. 75), in like manner as was done by the Court of Chancery.

The Probate Court, however, unless reason be shown on affidavit (*Brandreth v. Brandreth and wife*, 2 S. & T. 446; 31 L. J. 153) to the contrary, is the Court in which the cause ought to be tried. The power of the judge to direct an issue is discretionary, and to be exercised only where it would be a discreet exercise of such power. In *Cooper v. Moss*, 1 S. & T. 143, the Court refused to direct an issue where the cause had excited considerable discussion and feeling in the county where it was proposed to be tried, also where there was a probability of the cause being made a remanet at the ensuing assizes. *Ingram v. Fuller and another*. And where, upon the motion of the defendant, an issue was directed to be tried at the summer assizes to be holden at Norwich in 1858, and through the defendant's default it did not come on for trial, the Court, upon application made by the plaintiff (the defendant opposing), directed the cause to be tried in the Court of Probate. *Esling v. Dixon*.

An action will be tried in the Probate Court where the party opposing it being sent to the assizes undertakes to pay to the other party the extra costs of a trial in London.

The only ground which induces the Court to direct an issue to the assizes is the saving of expense in respect of the witnesses, and when one of the parties applies for an issue and the other party opposes the application and offers to undertake to pay the extra costs occasioned by bringing the witnesses to London, the judge invariably directs the cause to be tried in the Probate Court.

ORDER XXXVI.

Trial.

Place of trial. “ There shall be no local venue for the trial of any
 “ action, but when the plaintiff proposes to have the action
 “ tried elsewhere than in Middlesex, he shall in his state-
 “ ment of claim name the county or place in which he
 “ proposes that the action shall be tried, and the action
 “ shall, unless a judge otherwise orders, be tried in the
 “ county or place so named. Where no place of trial is
 “ named in the statement of claim, the place of trial shall,

“ unless a judge otherwise orders, be the county of Middlesex. Any order of a judge, as to such place of trial, may be discharged or varied by a Divisional Court of the High Court.” R. 1.

“ Subject to the provisions of the following rules, the plaintiff may, with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of the modes mentioned in Rule 2” (see *ante*, 336); “and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or judge may allow, to the effect that he desires to have the issues of fact tried before a judge and jury, be entitled to have the same so tried.” R. 3.

Notice of trial
by plaintiff.

“ Subject to the provisions of the following rules, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a Court or judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, and thereby specify one of the modes mentioned in Rule 2; and in such case the plaintiff, on giving notice within the time fixed by Rule 3 that he desires to have the issues of fact tried before a judge and jury, shall be entitled to have the same so tried.” R. 4.

Notice of trial
by defendant.

“ In any case in which neither the plaintiff nor defendant has given notice under the preceding rules that he desires to have the issues of fact tried before a judge and jury, or in any case within the 57th section of the Act, if the plaintiff or defendant desires to have the action tried in any other mode than that specified in the notice of trial, he shall apply to the Court or a judge for an order to that effect, within four days from the time of the service of the notice of trial, or within such extended time as a Court or judge may allow.” R. 5.

Application
for order
changing
mode of trial.

“ Subject to the provisions of the preceding rules, the Court or a judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one

Modes and
order of trial
of questions
of fact.

“ or more questions of fact be tried before the others, and
 “ may appoint the place or places for such trial or trials,
 “ and in all cases may order that one or more issues of fact
 “ be tried before any other or others.” R. 6.

Trial by jury. “ Every trial of any question or issue of fact by a jury shall
 “ be held before a single judge, unless such trial be specially
 “ ordered to be held before two or more judges.” R. 7.

Form of notice. “ Notice of trial shall state whether it is for the trial of
 “ the action or of issues therein. It may be in the Form
 “ No. 14 in Appendix (B.), with such variations as cir-
 “ cumstances may require.” R. 8.

Form of
 notice of trial.

Form of Notice of Trial.

“ In the High Court of Justice.

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Take notice of trial of this action [*or* of the issues of
 “ this action directed to be tried] by a judge and jury [*or*
as the case may be] in

“ Dated the day of 18 .

“ X. Y., plaintiff's solicitor.

“ Z., defendant's solicitor.”

Length of
 notice.

“ Ten days notice of trial shall be given, unless the party
 “ to whom it is given has consented to take short notice of
 “ trial; and shall be sufficient in all cases, unless otherwise
 “ ordered by the Court or a judge. Short notice of trial
 “ shall be four days notice.” R. 9.

Notice before
 entry.

“ Notice of trial shall be given before entering the action
 “ for trial.” R. 10.

Operation of
 notice in
 London and
 Middlesex.

“ Notice of trial for London or Middlesex shall not be
 “ or operate as for any particular sittings; but shall be
 “ deemed to be for any day after the expiration of the
 “ notice on which the action may come on for trial in its
 “ order upon the list.” R. 11.

Elsewhere.

“ Notice of trial elsewhere than in London or Middlesex
 “ shall be deemed to be for the first day of the then next
 “ assizes at the place for which notice of trial is given.”
 R. 12.

“ No notice of trial shall be countermanded, except by consent, or by leave of the Court or a judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just.” R. 13.

How notice to be countermanded.

“ If the party giving notice of trial for London or Middlesex omits to enter the action for trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last rule, within four days enter the action for trial.” R. 14.

Default to enter cause after notice.

“ If notice of trial is given for elsewhere than in London or Middlesex, either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff’s entry.” R. 15.

Entry for trial.

Entry of Action for Trial.

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between . . . Plaintiff,
and
“ . . . Defendant.

“ Enter this action for trial.

“ Dated the day of 18 .
“ (Signed)
“ (Address) .”

“ The party entering the action for trial shall deliver to the officer two copies of the whole of the pleadings in the action, one of which shall be for the use of the judge at the trial. Such copies shall be in print, except as to such parts, if any, of the pleadings as are by these rules permitted to be written.” R. 17.

Proceedings on entry for trial.

“ If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him.” R. 18.

When defendant fails to appear at trial.

When plaintiff fails to appear.

“ If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action; but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him.” R. 19.

Application to set aside judgment obtained on default.

“ Any verdict or judgment obtained where one party does not appear at the trial, may be set aside by the Court or a judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex.” R. 20.

Adjournment of trial.

“ The judge may, if he think it expedient for the interests of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit.” R. 21.

Power of judge as to entry or non-entry of judgment.

“ Upon the trial of an action, the judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or judge.” R. 22A.

Entry of findings of fact in assize cases.

“ Upon every trial at the assizes, or at the London and Middlesex sitting of the Queen’s Bench, Common Pleas, or Exchequer Division, where the officer present at the trial is not the officer by whom judgments ought to be entered, the associate shall enter all such findings of fact as the judge may direct to be entered, and the directions, if any, of the judge as to judgment, and the certificates, if any, granted by the judge, in a book to be kept for the purpose.” R. 23.

Entry of absolute judgment how authorized.

“ If the judge shall direct that any judgment be entered for any party absolutely, the certificate of the associate to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate may be in the Form No. 15 in Appendix (B.) hereto.” R. 24.

Form of Certificate of Officer after Trial by a Jury.

"30th November, 1876.

1876. No .

" In the High Court of Justice.

" Division.

" Between A. B. Plaintiff,
and

" C. D. Defendant.

" I certify that this action was tried before the Honour-
able Mr. Justice and a special jury of the county
of on the 12th and 13th days of November, 1876.

" The jury found [*state findings*].

" The judge directed that judgment should be entered
for the plaintiff for l. with costs of summons [*or*
as the case may be].

" A. B.,

" [Title of Officer]."

" If the judge shall direct that any judgment be entered
for any party subject to leave to move, judgment shall
be entered accordingly upon the production of the asso-
ciate's certificate." R. 25.

The like when
judgment
subject to
leave.

" The Court or a judge may, if it shall appear desirable,
direct a trial without a jury of any question or issue of
fact, or partly of fact and partly of law, arising in
any cause or matter which previously to the passing of
the Act could, without any consent of parties, be tried
without a jury." R. 26.

Power to
direct trials
without jury.

" The Court or a judge may, if it shall appear either
before or at the trial that any issue of fact can be more
conveniently tried before a jury, direct that such issue
shall be tried by a judge with a jury." R. 27.

Power to
direct trials
before judge
and jury.

" Subject to any Rules of Court, any judge of the said
High Court, sitting in the exercise of its jurisdiction
elsewhere than in a Divisional Court, may reserve any
case, or any point in a case, for the consideration of a
Divisional Court, or may direct any case, or point in a
case, to be argued before a Divisional Court; and any

36 & 37 Vict.
c. 66, s. 46.

Cases and
points may
be reserved for
or directed to
be argued
before Divi-
sional Courts.

“Divisional Court of the said High Court shall have
 “power to hear and determine any such case or point
 “so reserved or so directed to be argued.” R. 46.

OF THE JURISDICTION OF THE COUNTY COURTS IN CONTENTIOUS BUSINESS.

Where per-
 sonalty under
 200*l.* and
 realty under
 300*l.*, County
 Courts have
 jurisdiction.

Where the personal property of the deceased, exclusive of what he is entitled to as trustee, is under 200*l.*, but without deducting anything on account of debts, and the real property is under 300*l.*, without making deductions for mortgages thereon (*Davies v. Brecknell*, 2 L. R. [not yet reported]), the judge of the County Court having jurisdiction in the place where the deceased had at the time of his death a fixed place of abode has the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto. (Sect. 10, Court of Probate Act (1858); see also sects. 55, 56, 57, the Court of Probate Act (1857).)

Optional to
 parties to
 apply to Pro-
 bate Court
 or County
 Court.

It is not, however, obligatory where the property of the deceased is within the amount, and the residence of the deceased within the district, required to found the jurisdiction of the County Court, on any person to apply through the County Court for probate or administration. But when in any contentious matter it is shown to the Court of Probate that the state of the property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a County Court, the judge of the Court of Probate *may* send the cause to such County Court, and the judge thereof shall proceed therein as if such application and cause had been made to and arisen in his court in the first instance. (Sect. 59 of the Court of Probate Act (1857).) And where the County Court is shown to have jurisdiction, the Probate Court *may*, though application be made on behalf of all the parties to the cause for it to be tried before the court itself or at the assizes,

still, in its discretion, direct it to be tried in the County Court. *Dunn v. Dunn*, 1 S. & T. 521; 30 L. J. 40.

Where the County Court has jurisdiction, the proceedings in the cause up to and inclusive of the application for directions as to the mode of trial are in the Court of Probate.

Proceedings in Court of Probate may be transferred at any stage.

The court, on the application for directions as to the mode of trial, will make the order for the cause to be tried by the judge of the County Court having jurisdiction in the place where the deceased had at the time of his death a fixed place of abode, and will direct the papers and pleadings in the cause to be transmitted to the County Court judge for the purposes of the trial. The manner in which the cause is to be tried, whether with or without a jury, will be determined in the County Court.

Proceedings in County Court.

When the judgment of the County Court has been pronounced on the issues raised on the pleadings, a certified copy of the decree of the judge of the County Court should be filed in the Principal Registry.

Proceedings in Court of Probate after decision of County Courts.

The County Court, after a cause has been transferred to it, is to make the final decree, and to decide all questions arising in the cause as to costs (*Macleur v. Macleur*, 1 L. R. 604; 37 L. J. 68), and is to entertain and decide on any application for a new trial. And the Court of Probate was only authorized to make an order in such cause on an appeal from the determination of the County Court on a point of law, or upon the admission or rejection of evidence under sect. 58 of the Probate Act (1857). *Zealley v. Veryard and Bridle*, 1 L. R. 195. A copy of the decree of the judge of the County Court should be filed in the Principal Registry.

Appeal from County Court to Court of Probate.

The following are the sections of the Court of Probate Act, 1857, and of the Court of Probate Act, 1858, relating to the jurisdiction of the County Courts in contentious probate business.

“ On a decree being made by a judge of a County Court
“ for the grant or revocation of a probate or administration
“ in any such cause, the registrar of the County Court

Registrar of County Court to transmit certificate of

decree for
grant or revo-
cation of pro-
bate.

“ shall transmit to the district registrar of the district in
“ which it shall have been sworn that the deceased had at
“ the time of his decease his fixed place of abode, a certifi-
“ cate under the seal of the County Court of such decree
“ having been made, and thereupon on the application of
“ the party or parties in favour of whom such decree shall
“ have been made, a probate or administration in com-
“ pliance with such decree shall be issued from such dis-
“ trict registry; or, as the case may require, the probate
“ or letters of administration theretofore granted shall be
“ recalled or varied by the district registrar according to
“ the effect of such decree.” Court of Probate Act, 1857,
sect. 55.

The judge of
the County
Court to
decide causes
and enforce
judgment as
in other cases.

“ The judge of any County Court before whom any dis-
“ puted question shall be raised relating to matters and
“ causes testamentary under this Act shall, subject to the
“ rules and orders under this Act, have all the jurisdiction,
“ power and authority to decide the same and enforce
“ judgment therein, and to enforce orders in relation
“ thereto, as if the same had been an ordinary action in
“ the County Court.” *Ib.* sect. 56.

Affidavit of
the facts
giving the
County Court
jurisdiction to
be conclusive,
unless dis-
proved while
the matter is
pending.

“ The affidavit as to the place of abode and state of the
“ property of a testator or intestate which is to give con-
“ tentious jurisdiction to the judge of a County Court
“ under the previous provisions shall, except as hereinafter
“ provided, be conclusive for the purpose of authorizing
“ the exercise of such jurisdiction, and the grant or revo-
“ cation of probate or administration in compliance with
“ the decree of such judge; and no such grant of probate
“ or administration shall be liable to be recalled, revoked
“ or otherwise impeached by reason that the testator or
“ intestate had no fixed place of abode within the juris-
“ diction of such judge or within any of the said districts
“ at the time of his death, or by reason that the personal
“ estate sworn to be under the value of two hundred pounds
“ did in fact amount to or exceed that value, or that the
“ value of the real estate of or to which the deceased was
“ seised or entitled beneficially at the time of his death

“amounted to or exceeded three hundred pounds: provided, that where it shall be shown to the judge of a County Court before whom any matter is pending under this Act that the place of abode or state of the property of the testator or intestate in respect of whose will or estate he may have been applied to for grant or revocation of probate or administration has not been correctly stated in the affidavit, and if correctly stated would not have authorized him to exercise such contentious jurisdiction, he shall stay all further proceedings in his Court in the matter, leaving any party to apply to the Court of Probate for such grant or revocation, and making such order as to the costs of the proceedings before him as he may think just.” *Ib.* sect. 57.

“Any party who shall be dissatisfied with the determination of the judge of the County Court in point of law, or upon the admission or rejection of any evidence in any matter or cause under this Act, may appeal from the same to the Court of Probate, in such manner and subject to such regulations as may be provided by the rules and orders to be made under this Act, and the decision of the Court of Probate on such appeal shall be final.” *Ib.* sect. 58.

As to appeals from County Court.

“It shall not be obligatory on any person to apply for probate or administration to any district registry, or through any County Court, but in every case such application may be made through the principal registry of the Court of Probate wherever the testator or intestate may at the time of his death have had his fixed place of abode: provided, that where in any contentious matter arising out of any such application it is shown to the Court of Probate that the state of the property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a County Court, the Court of Probate may send the cause to such County Court, and the judge thereof shall proceed therein as if such application and cause had been made to and arisen in his Court in the first instance.” *Ib.* sect. 59.

Not obligatory to apply for probate, &c. to district registries or County Court, but may in every case be made to Court of Probate.

[Amended by “Court of Probate Act, 1858,” ss. 12 and 20.]

Where personalty is under 200*l.* County Court to have jurisdiction.

“Where it appears by affidavit to the satisfaction of a registrar of the principal registry that the testator or intestate in respect of whose estate a grant or revocation of a grant of probate or letters of administration is applied for had at the time of his death his fixed place of abode in one of the districts specified in schedule (A) to the said “Court of Probate Act,” and that the personal estate in respect of which such probate or letters of administration are to be or have been granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was at the time of his death under the value of two hundred pounds, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate of the value of three hundred pounds or upwards, the judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto.” Court of Probate Act, 1858, sect. 10.

Sect. 54 of 20 & 21 Vict. c. 77, repealed.

“Section fifty-four of the said Court of Probate Act shall be and the same is hereby repealed.” Ib. sect. 11.

Sect. 59 of 20 & 21 Vict. c. 77, to apply to applications for revocation of grants.

“The said Court of Probate Act, section fifty-nine, shall, so far as the County Courts or a judge thereof are concerned, apply to an application for the revocation of a grant of probate or administration as well as to an application for any such grant.” Ib. sect. 12.

Notices to Produce and Admit Documents.

Effect of notice to produce.

Where an original document is presumably in the custody of an adverse party, he or his solicitor should be served with a written notice to produce it, if it is required at the trial, and on his failing to do so, upon proof of

service of the notice, secondary evidence of its contents may be given by the party who gave the notice.

Notice to Produce (General Form).

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between . . . Plaintiff,
and

“ . . . Defendant.

“ Take notice, that you are hereby required to produce
“ and show to the Court on the trial of this action all
“ books, papers, letters, copies of letters, and other writ-
“ ings and documents in your custody, possession, or
“ power, containing any entry, memorandum, or minute
“ relating to the matters in question in this action, and
“ particularly

“ Dated the day of 18 .

“ (Signed)

“ of

“ To the above-named “ agent for

“ solicitor for the above-

“ solicitor or agent.” “ named .

ORDER XXXII.

“ Any party to an action may give notice, by his own
“ statement or otherwise, that he admits the truth of the
“ whole or any part of the case stated or referred to in the
“ statement of claim, defence, or reply of any other party.”
R. 1.

Order
XXXII.
Notice of
admission of
case in plead-
ings.

“ Either party may call upon the other party to admit
“ any document, saving all just exceptions; and in case of
“ refusal or neglect to admit, after such notice, the costs
“ of proving any such document shall be paid by the party
“ so neglecting or refusing, whatever the result of the
“ action may be, unless at the hearing or trial the Court

Notice to
admit docu-
ments.

“certify that the refusal to admit was reasonable; and
 “no costs of proving any document shall be allowed unless
 “such notice be given, except where the omission to give
 “the notice is, in the opinion of the taxing officer, a saving
 “of expense.” R. 2.

“A notice to admit documents may be in the Form
 “given in note A. (B).” R. 3.

Affidavit of
 signature
 evidence of
 admission.

“An affidavit of the solicitor or his clerk, of the due
 “signature of any admissions made in pursuance of any
 “notice to admit documents, and annexed to the affidavit,
 “shall be sufficient evidence of such admissions.” R. 4.

Form of Notice to admit Documents.

“In the High Court of Justice.

“Probate, Divorce and Admiralty Division.

“(Probate.)

“A. B. *v.* C. D.

“Take notice, that the plaintiff [*or defendant*] in this
 “cause proposes to adduce in evidence the several docu-
 “ments hereunder specified, and that the same may be
 “inspected by the defendant [*or plaintiff*], his solicitor or
 “agent, at _____, on _____, between the hours of _____;
 “and the defendant [*or plaintiff*] is hereby required,
 “within forty-eight hours from the last-mentioned hour,
 “to admit that such of the said documents as are specified
 “to be originals were respectively written, signed, or
 “executed, as they purport respectively to have been;
 “that such as are specified as copies are true copies; and
 “such documents as are stated to have been served, sent,
 “or delivered, were so served, sent, or delivered respec-
 “tively; saving all just exceptions to the admissibility of
 “all such documents as evidence in this cause.

“Dated, &c.

“To E. F., solicitor [*or agent*] for defendant [*or plain-
 “tiff*].

“G. H., solicitor [*or agent*] for plaintiff [*or defendant*].”

“[*Here*

“ [*Here describe the documents, the manner of doing
“ which may be as follows :—*”] ”

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between A. B. and C. D. first part, and E. F. second part	January 1, 1848.
Indenture of lease from A. B. to C. D.	February 1, 1848.
Indenture of release between A. B., C. D. first part, &c.	February 2, 1848.
Letter—defendant to plaintiff	March 1, 1848.
Policy of insurance on goods by ship “Isabella,” on voyage from Oporto to London	December 3, 1847.
Memorandum of agreement between C. D., captain of said ship, and E. F.	January 1, 1848.
Bill of exchange for 100 <i>l.</i> at three months, drawn by A. B.* on and accepted by C. D., indorsed by E. F. and G. H.	May 1, 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism of A. B. in the parish of X.	January 1, 1848	Sent by General Post, February 2, 1848. Served March 2, 1848, on defendant's attorney by E. F., of ———
Letter—plaintiff to defendant.	February 1, 1848	
Notice to produce papers	March 1, 1848..	
Record of a judgment of the Court of Queen's Bench in an action, J. S. v. J. N.	Trinity Term, 10th Vict.	
Letters Patent of King Charles II. in the Rolls Chapel	January 1, 1680	

Subpœna.

“ In the High Court of Justice. 18 . No. .
 “ Probate, Divorce and Admiralty Division.
 “ (Probate.)
 “ Between . . . Plaintiff,
 and
 “ . . . Defendant.
 “ Seal writ of subpœna on behalf of the
 “ directed to returnable .
 “ Dated the day of 18 .
 “ (Signed) .
 “ (Address) .
 “ Solicitor for the .”

FORMS OF SUBPŒNAS.

Subpœna ad Testificandum at Sittings of High Court.

“ In the High Court of Justice. 18 . No. .
 “ Probate, Divorce and Admiralty Division.
 “ (Probate.)
 “ Between . . . Plaintiff,
 and
 “ . . . Defendant.
 “ Victoria, by the Grace of God of the United Kingdom
 “ of Great Britain and Ireland Queen, Defender of the
 “ Faith, to*
 “ greeting: We command you to attend at the sittings of
 “ the Division of our High Court of Justice, for†
 “ to be holden at on day the day
 “ of 18 , at the hour of in the
 “ noon, and so from day to day during the said sittings,
 “ until the above cause is tried, to give evidence on behalf
 “ of the .
 “ Witness, Hugh MacCalmont, Earl Cairns, Lord High
 “ Chancellor of Great Britain, the day of in
 “ the year of Our Lord One thousand eight hundred and
 “ .”

*The names
of three wit-
nesses may be
inserted.

† London or
Westminster.

Subpœna Duces Tecum at Sittings of High Court.

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between . . . Plaintiff,

and

“ . . . Defendant.

“ Victoria, by the Grace of God of the United Kingdom
“ of Great Britain and Ireland Queen, Defender of the
“ Faith, to*

“ We command you to attend at the sittings of the

“ Division of our High Court of Justice for† , to be

“ holden at on day the day of

“ 18 , at the hour of o’clock in the noon,

“ and so from day to day until the above cause is tried, to

“ give evidence on behalf of the and also to bring

“ with you and produce at the time and place aforesaid‡

“ .

“ Witness, Hugh MacCalmont, Earl Cairns, Lord High

“ Chancellor of Great Britain, the day of in

“ the year of Our Lord One thousand eight hundred and

“ .”

* The names
of three wit-
nesses may be
inserted.

† London or
Westminster.

‡ Specify
documents to
be produced.

Subpœna ad Testificandum at Assizes.

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between . . . Plaintiff,

and

“ . . . Defendant.

“ Victoria, by the Grace of God of the United Kingdom

“ of Great Britain and Ireland Queen, Defender of the

“ Faith, to*

“ greeting: We command you to attend before our jus-

“ tices assigned to take the assizes in and for the county

“ of to be holden at on day the

“ day of 18 , at the hour of in the

“ noon, and so from day to day during the said assizes

* The names
of three wit-
nesses may be
inserted.

“ until the above cause is tried, to give evidence on behalf
“ of the .

“ Witness, Hugh MacCalmont, Earl Cairns, Lord High
“ Chancellor of Great Britain, the day of in
“ the year of Our Lord One thousand eight hundred and
“ .”

Subpœna Duces Tecum at Assizes.

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between . . . Plaintiff,
and

“ . . . Defendant.

“ Victoria, by the Grace of God of the United Kingdom
“ of Great Britain and Ireland Queen, Defender of the
“ Faith, to*

* The names
of three wit-
nesses may be
inserted.

“ greeting: We command you to attend before our jus-
“ tices assigned to take the assizes in and for the county
“ of to be holden at on day the
“ day of 18 , at the hour of in the
“ noon, and so from day to day during the said assizes,
“ until the above cause is tried, to give evidence on behalf
“ of the , and also to bring with you and produce
“ at the time and place aforesaid† .

† Specify
documents to
be produced.

“ Witness, Hugh MacCalmont, Earl Cairns, Lord High
“ Chancellor of Great Britain, the day of in
“ the year of Our Lord One thousand eight hundred and
“ .”

Sect. 20, Judi-
cature Act,
1875.

Provision as
to Act not
affecting rules
of evidence or
juries.

38 & 39 Vict.
c. 77.

“ Nothing in this Act or in the First Schedule hereto,
“ or in any Rules of Court to be made under this Act,
“ save as far as relates to the power of the Court for
“ special reasons to allow depositions or affidavits to be
“ read, shall affect the mode of giving evidence by the
“ oral examination of witnesses in trials by jury, or the
“ rules of evidence, or the law relating to jurymen or
“ juries.” Sect. 20, J. A. 1875.

ORDER XXXVII.

Evidence Generally.

“In the absence of any agreement between the parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined *vivâ voce* and in open Court, but the Court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.” R. 1.

“Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.” R. 3.

“In any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party, ten days at least before the trial or other proceeding in which the said

Mode of giving evidence.

What facts to be stated in affidavits.

The Court of Probate Act, 1857, s. 64.

Admission of probate in evidence in lieu of original will upon notice given.

“proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will, or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition.” Court of Probate Act, 1857, s. 64.

Declarations of testator as to contents of a lost will.

Where a will has been lost or destroyed unintentionally, declarations, written or oral, made by the testator, both before and after the execution of the will, are admissible as secondary evidence of its contents. *Syden v. Lord St. Leonards*, 1 P. Div. 154; 45 L. J. 49.

The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached. *Ib.* 154.

ORDER XXXVIII.

Evidence by Affidavit.

Order XXXVIII.
Time for delivery of affidavit by plaintiff.

“Within fourteen days after a consent for taking evidence by affidavit as between the plaintiff and the defendant has been given, or within such time as the parties may agree upon, or a judge in chambers may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.” R. 1.

Time for delivery of affidavits by defendants.

“The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a judge in chambers may allow, shall file his

“ affidavits and deliver to the plaintiff or his solicitor a list thereof.” R. 2.

“ Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.”

Time for delivery of affidavits in reply.

R. 3.

“ When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.”

Cross-examination of deponents; notice, and when to be given.

R. 4.

Notice of Cross-examination of Deponents at Trial.

“ In the High Court of Justice. 18 . No. .

“ Probate, Divorce and Admiralty Division.

“ (Probate.)

“ Between . . . Plaintiff,

and

. . . Defendant.

“ Take notice, that the intend at the trial of this action to cross-examine the several deponents named and described in the schedule hereto on their affidavits therein specified.

T.

S

“ And also take notice that you are hereby required to
 “ produce the said deponents for such cross-examination
 “ before the Court aforesaid.

“ Dated the day of 18 .

“ (Signed)

“ Agent for

“ of

“ Solicitor for the

“ To

“ The SCHEDULE above referred to.

Name of Deponent.	Address and Description.	Date when Affidavit Filed.

How atten-
 dance of de-
 ponent to be
 compelled.

“ The party to whom such notice as is mentioned in the
 “ last preceding rule is given, shall be entitled to compel
 “ the attendance of the deponent for cross-examination in
 “ the same way as he might compel the attendance of a
 “ witness to be examined.” R. 5.

Affidavits to
 be printed.

“ When the evidence in any action is under this order
 “ taken by affidavit, such evidence shall be printed, and
 “ the notice of trial shall be given at the same time or
 “ times after the close of the evidence as in other cases is
 “ by these rules provided after the close of the pleadings.”
 R. 6.

Form of
 affidavits.
 Order
 XXXVII.
 Rule 3a.

“ Every affidavit shall be drawn up in the first person,
 “ and shall be divided into paragraphs, and every paragraph
 “ shall be numbered consecutively, and as nearly as may
 “ be shall be confined to a distinct portion of the subject.
 “ Every affidavit shall be written or printed bookwise. No
 “ costs shall be allowed for any affidavit or part of an affi-
 “ davit substantially departing from this rule.” R. 12.

Description
 and address
 of deponent
 to be stated.
 Order
 XXXVII.
 Rule 3b.

“ Every affidavit shall state the description and true
 “ place of abode of the deponent.” R. 13.

“ In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the ‘ above-named ’ deponents.” R. 14.

Affidavits made by two or more deponents.
Order XXXVII.
Rule 3c.

“ Every affidavit shall be filed in the central office. There shall be appended to every affidavit a note showing on whose behalf it is filed.” R. 15.

Affidavit to be filed.
Order XXXVII.
Rule 3d.

“ No affidavit having in the jurat or body thereof any interlineations, alteration, or erasure shall without leave of the Court or a judge be read or made use of in any matter depending in Court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the central office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialed in the margin of the affidavit by the officer taking it.” R. 16.

Alterations in affidavits.
Order XXXVII.
Rule 3e.

“ Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his or her signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a judge is otherwise satisfied that the affidavit was read over to and apparently perfectly understood by the deponent.” R. 17.

Affidavits by illiterate persons.
Order XXXVII.
Rule 3f.

“ In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used be delivered to and left with the proper officer in Court or in Chambers, who shall send it to the central office. An office copy of an affidavit may

Order XXXVII.
Rule 3g.

“ in all cases be used, the original affidavit having been
 “ previously filed in the central office, and the copy duly
 “ authenticated with the seal of that office.” R. 18.

ORDER XL.

Motion for Judgment.

How judgment is obtained.

“ Except where by the Act or by these rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.” R. 1.

Where judgment subject to leave.

“ Where at the trial of an action the judge or a referee has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the judge in reserving leave, or if no time has been limited, within ten days after the trial. The notice of motion shall state the grounds of the motion, and the relief sought, and that the motion is pursuant to leave reserved.” R. 2.

Motion for judgment when not directed to be entered.

“ Where at the trial of an action the judge or referee abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.” R. 3.

Application to Court of Appeal to set aside judgment directed to be entered by judge after trial by jury.

“ Where, at or after the trial of an action by a jury, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered, with reference to the finding of the jury upon the question or questions submitted to them.”

“Where, at or after the trial of an action before a judge, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and to enter any other judgment, upon the ground that, upon the finding as entered the judgment so directed is wrong.” Without jury.

“An application under this Rule shall be to the Court of Appeal.” R. 4—*Dec. Orders, 1876.*

“Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within ten days after his right so to do has arisen, then after the expiration of such ten days any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.” R. 7. Motion on issues or questions of fact.

“Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact.” R. 8. Application where some only of issues or questions have been tried.

“No action shall, except by leave of the Court or a judge, be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.” R. 9. Leave necessary for motion after one year.

Postponing of judgment. “ Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit.” R. 10.

Anticipatory judgment. “ Any party to an action may at any stage thereof apply to the Court or a judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. The foregoing rules of this order shall not apply to such applications, but any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a judge may, on any such application, give such relief, subject to such terms, if any, as such Court or judge may think fit.” R. 11.

ORDER XLI.

Entry of Judgment.

Mode of entry. “ Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the action other than any petition or summons; such copy shall be in print, except such parts (if any) of the pleadings as are by these rules permitted to be written: Provided that no copy need be delivered of any pleading a copy of which has been delivered on entering any previous judgment in such action. The forms in Appendix (D.) hereto may be used, with such variations as circumstances may require.” R. 1.

Judgment on Motion after Trial of Issue.

" In the High Court of Justice. 18 . No. .

" Probate, Divorce and Admiralty Division.

" (Probate.)

" Between . . . Plaintiff.

and

. . . Defendant.

*" The day of , 18 .

*Date of order of Court.

†" The of fact arising in this action by the order

† "issues" or "questions."

" dated the day of , ordered to be tried

" before having on the day of been

" tried before , and the having found

" Now on motion before the Court for judgment on behalf

" of the , the Court having

" It is this day adjudged that the recover against

" the the sum of £ and costs to be taxed.

" The above costs have been taxed and allowed at

" £ , as appears by a Master's Certificate dated

" the day of , 18 .

" Judgment entered the day of , 18 ."

Judgment on Motion Generally.

" In the High Court of Justice. 18 . No. .

" Probate, Divorce and Admiralty Division.

" (Probate.)

" Between . . . Plaintiff,

and

. . . Defendant.

" ‡The day of , 18 .

‡Date of order of Court.

" This action having on the day of , 18 ,

" come on before the Court on motion for judgment on

" behalf of the , and the Court after hearing counsel

" for the having ordered that § "

§ As in order of Court.

ORDER LV.

Costs.

" Subject to the provisions of the Act, the costs of and

" incident to all proceedings in the High Court shall be in

“ the discretion of the Court ; but nothing herein contained
 “ shall deprive a trustee, mortgagee, or other person of
 “ any right to costs out of a particular estate or fund to
 “ which he would be entitled according to the rules hitherto
 “ acted upon in Courts of Equity : provided that where
 “ any action or issue is tried by a jury, the costs shall
 “ follow the event, unless upon application made at the
 “ trial for good cause shown the judge before whom such
 “ action or issue is tried, or the Court shall otherwise
 “ order.” R. 1.

The question of costs was by the practice of the Prerogative Court in the discretion of the judge, and this practice was continued in the Court of Probate. See Rules 4, 5, and 6, Cont. Bus. 1862.

By Rule 4, executors or other parties who, previously to the passing of the Court of Probate Act, 1857, might prove wills in solemn form of law, shall be at liberty to prove wills under similar circumstances, and with the same privileges, liabilities and effect as heretofore.

So also by Rule 5, next of kin and others who, previous to the passing of the said Act, had a right to put executors or parties entitled to administration with the will annexed upon proof of a will in solemn form of law shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs, as heretofore.

By Rule 6, interveners continue subject to the same rules with respect to costs as heretofore.

There were certain rules, however, from time to time laid down in the cases in the Prerogative Court for the guidance of the Court in determining the question of costs. These rules were followed by the judges of the Court of Probate, who supplemented them by some additional rules suggested by the special circumstances of particular cases coming under their consideration.

An executor
 proving a will
 in solemn
 form is en-
 titled to take
 his costs out

An executor who proves a will in solemn form, whether he has done so of his own motion, or has been put on proof of the will by parties interested, is entitled to have his costs out of the estate. It is unnecessary for him to

make any application to the Court for them, as he has a right to take them out of the estate without an order of the Court. This right would seem to flow as a consequence from the ancient rule, that all the expenses incidental to proving a will are a charge upon the estate of the testator, and that the party who takes probate is entitled to recoup himself out of the estate for the costs he may have incurred in obtaining such probate.

But where an executrix, who through carelessness had lost a will and proved a draft of it in solemn form, she was only allowed such costs as she would have incurred in proving the original will in solemn form, and was condemned in the costs of the defendant. *Burks v. Burks*, 1 L. R. 472; 36 L. J. 125.

A residuary or other legatee who propounds a will in solemn form *loco executoris*, and obtains a decree in favour of such will, is entitled to have his costs also out of the estate. *Williams v. Goude and Bennet*, 1 Hagg. 610; *Thorne v. Rooke*, 2 Curt. 831; *Sutton v. Drax*, 2 Phill. 323. But he has not, like an executor, a right to take them *ex officio*, unless he becomes administrator *cum testamento annexo*. For when the court pronounces for a will propounded by an executor, the executor takes probate of it himself and is put in possession of the fund, out of which he may recoup himself for the expenses he has incurred in the suit. But when the Court pronounces for a will propounded by a residuary legatee or a legatee, the residuary legatee or legatee is not of right entitled to letters of administration with the will annexed. It is competent to the executor, upon the will being pronounced for, if he has not renounced, though he has been cited to propound it and has not done so, to come in and take probate in common form, or if he is disqualified from taking probate or is unwilling to take it, it is competent to a non-litigant residuary legatee to take letters of administration with the will annexed in preference to a propounding legatee. *Bewsher v. Williams*, 3 S. & T. 62.

of the estate without an order of the Court.

An executrix having lost a will through carelessness not allowed full costs.

A residuary or other legatee on proving a will in solemn form is entitled to costs out of the estate.

He should apply to the Court for them.

Should the person having a prior title to the grant take it in priority to a legatee having an inferior title to it, who has established the will, the latter is without control over the estate of the testator, and therefore without power to recoup himself for the expenses incurred by him in obtaining the decree. His most convenient mode of securing payment of his costs is by applying to the Court to include in the decree pronouncing for the will an order that his costs be paid out of the estate. The application should be made on the Court pronouncing for the validity of the will. But in *Beursher v. Williams and others*, *supra*, where no order had been made as to costs when the decree was pronounced, the Court subsequently ordered the legatee, who had propounded the will, to have her costs out of the estate.

Where, also, executors had obtained a verdict in favour of the validity of a will, and a new trial was granted to parties who had appeared but had not originally pleaded, the Court made an order for the executors to have the costs of the first trial out of the estate. *Boulton v. Boulton*, 1 L. R. 456; 37 L. J. 19.

If probate of the will is refused to the executor, it is in the discretion of the Court to grant or refuse him his costs out of the estate, or to condemn him in the costs incurred by the party who has successfully opposed the probate.

It was only under special circumstances, and in later times, that the Prerogative Court felt itself authorized to give costs out of the estate to a person who had unsuccessfully propounded or contested the validity of a will. *Dean v. Russell*, 3 Phill. 334.

When the Prerogative Court directed the costs of an unsuccessful party to be paid out of the estate.

There were two classes of cases in which, by the practice of the Court, this was generally done:—

1. When a party had been led into the contest, whether as plaintiff or defendant, by the state in which the deceased had left his papers. *Hillam v. Walker*, 1 Hagg. 75; *Blake v. Knight*, 2 N. of Cas. 346; *Abbot v. Peters*, 4

Hagg. 381; *Armstrong v. Huddleston*, 1 Moo. P. C. 491; *Ayres v. Ayres*, 5 N. of Cas. 381.

2. Where the validity of a will had been contested on a doubtful point of law. *Robins and Paxton v. Dolphin*, 1 S. & T. 518; 27 L. J. 24; *Brooke v. Kent*, 3 Moo. P. C. 334.

There were three other classes of cases in which the Prerogative Court, in the exercise of its discretion, having regard however to the peculiar circumstances of each individual case, allowed costs out of the estate to a party who had unsuccessfully propounded or opposed a will.

(1.) Where there was a reasonable doubt as to the testator's testamentary competency at the time of the execution of the will.

Thus, where a sister and sole next of kin disputed the validity of the will of a testator, which was wholly inofficious, and by which he bequeathed his fortune to charity, it being established in evidence that the testator was eccentric in an extraordinary degree, that he had taken an unfounded dislike to his sister and other members of his family, and that his moral feelings were perverted, Sir Herbert Jenner Fust, though he pronounced for the will, directed the costs of the sister to be paid out of the estate. *Frere v. Peacock*, 1 Rob. Eccl. Rep. 456; *Waring v. Waring*, 5 N. of Cas. 324; *Borlase v. Borlase and others*, 4 N. of Cas. 140.

(2.) Where a party principally benefited by the will opposed had been guilty of improper acts, which exposed him to the suspicion of fraud or undue influence in procuring its execution. *Browning v. Budd*, 6 Moo. P. C. 430.

(3.) Where a case from its peculiar circumstances pre-eminently called for investigation. *Jones v. Godrich*, 5 Moo. P. C. 16; *Coventry v. Williams*, 3 N. of Cas. 172; *Symons v. Tozer*, 3 N. of Cas. 55; *Keating v. Brooks and others*, 4 N. of Cas. 273; *Gregory v. Her Majesty's Proctor and others*, 4 N. of Cas. 643.

When an unsuccessful party forfeited his claim to have costs out of the estate.

The right, however, of the unsuccessful party to his costs was forfeited:—

(1.) Where by his plea or his cross-examination he attempted to make a case of fraud or conspiracy, which he was not justified in doing by the evidence. *Barry v. Butlin*, 2 Moo. P. C. 492.

(2.) When, prior to the commencement of the suit, circumstances, which *prima facie* cast suspicion on the instrument sought to be impeached, had or might have been removed by inquiries which he had made or had had opportunities of making. *Nichols v. Binns*, 1 S. & T. 239.

(3.) When from circumstances disclosed during the progress of the cause he might have earlier judged that he ought not to have proceeded further in it. *Dean v. Russell*, 3 Phill. 334.

An executor who had unsuccessfully propounded a will was entitled, subject to the rules and limitations above laid down, to have his costs out of the estate; but if the court considered that the circumstances of the case did not entitle him to costs, it might either condemn the unsuccessful party personally in costs, or make no order as to costs, so leaving him to pay his own costs.

When an executor was condemned in costs.

Thus, where probate was refused of a will propounded by an executor, who was himself principally benefited by it, and against whom there were strong suspicions of fraud. *Dodge v. Meech*, 1 Hagg. 612: see also *Saph v. Atkinson*, 1 Add. 162. And again, where probate was refused of a will propounded by an executor (the husband of the testatrix), on the ground that it had been unduly obtained by him from his wife (*Marsh v. Tyrrell and Harding*, 2 Hagg. 141; *Baker v. Batt*, 1 Curt. 172), the executor in such case was condemned in the costs of the cause.

Next of kin or executors or legatee of a former will to have costs out of the estate.

When a next of kin or person entitled in distribution, or an executor or legatee of a former will, successfully contests the validity of a will, the Court will give him costs out of the estate, or against the unsuccessful party. *Critchell v. Critchell*, 3 S. & T. 41; 32 L. J. 108. If the unsuccessful

party is condemned in costs and unable to pay them, the other party, if he takes probate to a former will, or letters of administration with the will (a former will) annexed, or administers to the estate of the deceased, may take them out of the estate as part of the expenses incidental to obtaining probate or administration. But if he does not prove a former will himself, &c., or does not administer, he loses his claim to costs as against the estate. *Nash v. Yelloly*, 3 S. & T. 59. The disposition of the Court is to grant administration to a party who has upset a will, provided the issue of the grant is in its discretion. *Dew v. Clark*, 1 Hagg. 311.

Where a person of this class is unsuccessful in the suit, it is still competent to the Court, if the circumstances of the case are such as to warrant it, to allow him costs out of the estate; if not, it will either condemn him in costs or leave him to pay his own costs.

But next of kin and executors of former wills, even when unsuccessful in a suit, stand in a more favourable position than legatees do in respect of their rights and liabilities for costs.

By the practice of the Prerogative Court, next of kin (*Green v. Proctor and Newey*, 1 Hagg. 340), an executor of a former will (*Mansfield v. Shaw*, 3 Phill. 22; *Boston v. Fox*, 29 L. J. 68), and a creditor (*Dobbs v. Chisman*, 1 Phill. 160 and note), or other person in possession of administration, were permitted *before probate had been granted in common form*, to put an executor on proof of the will without being liable for costs, provided they did not do so vexatiously, or did not plead or attempt to set up in the interrogatories (*Barry v. Butlin*, 2 Moo. P. C. 492) a case of fraud or conspiracy which the evidence did not justify them in doing. But if they exercised this right vexatiously, or pleaded, or laid charges in the interrogatories which they were not justified by the evidence in doing, they were liable to be condemned in costs. *Constable and Bailey v. Tufnell and Mason*, 4 Hagg. 508; *Coppin v. Dillon*, 4 Hagg.

1. When successful in the suit.

2. In certain cases when unsuccessful in the suit.

Next of kin and executors of former wills in a more favourable position as to costs than legatees.

When next of kin or executors of a former will were liable to be condemned in costs.

375; *Huble v. Clarke*, 1 Hagg. 127. Again, when they put an executor on proof after he has taken probate in common form, they did so at the peril of costs. *Bell v. Armstrong*, 1 Add. 375.

By the practice which prevailed in the Prerogative Court, the first pleading in a cause of proving a will in solemn form was given in by the executor. It consisted of an allegation, generally in the form of what was termed a common condidit, wherein the executor pleaded the factum of the instrument propounded, the instructions for it, the testator's knowledge and approval of its contents, the due execution of it, and the testamentary capacity of the testator at the time the instructions were given and the instrument executed. In support of this allegation the executor, before the adverse party could plead, produced and examined witnesses, who were liable to cross-examination on interrogatories administered by him; and the next of kin of the deceased or a person entitled in distribution to his personal estate, or the executor of a former will, were entitled to administer interrogatories without being liable for costs, provided the interrogatories did not contain aspersions on character or charges which were not warranted by the evidence. If they pleaded, they did so at the risk of being condemned in the costs, at least of those incurred from the time when their allegation was given in.

The same favour was not extended in the Prerogative Court to a legatee of a will who merely interrogated the witnesses produced by the executor. The principle upon which the Court acted in these cases is thus stated by Sir John Nicholl, in *Urquhart and Waterman v. Fricker*, 3 Add. 57: "Where a next of kin," says that learned judge, "calls for proof of a will *per testes*, and merely "cross-examines the witnesses produced in support of that "will, he is not subject to costs generally speaking. I "add this last, because I can easily conceive a case in "which even a next of kin may exercise his undoubted "right in this matter so vexatiously as to make himself

“ responsible, if not wholly, in part, for the costs of his
 “ opponent. But next of kin are favourites of courts of
 “ law ; their interests, in cases of intestacy, accrue by *mere*
 “ operation of the law, and they have the plainest and
 “ most undoubted right to be satisfied that those interests
 “ are not defeated but upon good and sufficient grounds.
 “ A legatee under a former will is not so favourably re-
 “ garded : he *may*, certainly, call for proof *per testes* of a
 “ will by which his interests under a former will are pre-
 “ judiced ; he as certainly may interrogate the witnesses
 “ produced in support of that will ; but *he*, I apprehend,
 “ must clearly do this at the risk of being condemned in
 “ costs, if the court has reason to *suspect* him of undue
 “ and vexatious litigation. And this especially in a case
 “ like the present, where the legatee is a *mere* legatee,
 “ acting for his own sole benefit ; that is, where he is
 “ neither an executor at the same time of the will under
 “ which he claims, nor a trustee in it for the benefit of
 “ some other person or persons, for whose interest, in
 “ common with his own, he can be suggested to have acted
 “ in opposing the latter will.”

The question of costs being addressed to the discretion of the Court, and depending not unfrequently upon the special circumstances of each particular case, is often a difficult and embarrassing one. By R. C. B. 5, already referred to, parties who put executors and others upon proof of a will in solemn form of law in the Court of Probate possess the same privileges and are subject to the same liabilities with respect to costs as they would have been in the Prerogative Court. The first case in which anything like a general classification has been made, or a general rule has been laid down on this subject, is that of *Mitchell v. Gard*, 3 S. & T. 275 ; 33 L. J. 7, in which there are two general rules enunciated by Lord Penzance.

1st. That the unsuccessful party is entitled to costs out of the estate where the cause of litigation takes its origin in the fault of the testator by reason of his testamentary

When the unsuccessful party is entitled to costs out of the estate.

papers being surrounded by confusion or uncertainty in law or fact, or where the party interested in the residue has by his own improper conduct induced a litigation which the Court considers reasonable. See also *Goodacre v. Smith*, 1 L. R. 359; 36 L. J. 43. Thus in *Boughton v. Knight*, 3 L. R. 77; 42 L. J. 41, Sir James Hannen held that *primâ facie* an executor is justified in propounding his testator's will, and if the facts within his knowledge at the time he does so tend to show eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct, which afterwards induce the Court or a jury to find that the testator was insane at the date of the will, he will, on the principle that the testator's conduct was the cause of the litigation, be entitled to receive his costs out of the estate, although the will be pronounced against. So, where a next of kin had taken out administration after application made to the residuary legatee of a will, whether there was a will, to which application he made no answer, and a will was twelve months afterwards produced and proved in solemn form, the Court held that the administrator, who was the defendant in the suit, was entitled to have his costs out of the estate, including the costs of taking out administration. *Smith v. Smith*, 4 S. & T. 3; 34 L. J. 57. See also *Williams v. Henry*, 3 S. & T. 471; 33 L. J. 110.

General rules as to costs in Probate Court.

Costs given to an unsuccessful party where will prepared by a principal beneficiary, and no disinterested evidence of the testator's approval of it. When the unsuccessful party will not be condemned in costs.

An unsuccessful party is also entitled to his costs where one of the principal beneficiaries under a will has been actively engaged in its preparation, and has not shown by disinterested evidence that its dispositions were read over or explained to and approved of by the testator before its execution. *Dale v. Murrell*, March, 1879.

2nd. That the losing party will not be condemned in costs if there be a sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forth a charge of undue influence or fraud. Thus, where the attesting witnesses

gave conflicting accounts as to the due execution of the will (*Ferrey v. King*, 3 S. & T. 51; 31 L. J. 120), or the judge of assize was satisfied with a verdict establishing a will, but would not have been dissatisfied with a contrary verdict (*Bramley v. Bramley*, 3 S. & T. 430; 35 L. J. 111, n.), or where a next of kin, who had unsuccessfully opposed a will upon information given to him by one of the attesting witnesses, the testator's medical attendant, to the effect that when the will was read over the testator signified his approval of it by gesture only, and that he could not swear that the testator was of sound mind (*Tippett v. Tippett*, 1 L. R. 54; 35 L. J. 41), the Court refused to condemn the unsuccessful party in costs.

By Order XXII. R. 11, in probate actions "the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Court of Probate." *Summerell v. Clements*, 3 S. & T. 35; 32 L. J. 33.

Party opposing a will not liable for costs upon giving notice with defence that he only intends to cross-examine plaintiff's witnesses.

Under this rule a party will be protected from condemnation in costs by this notice, or if he gives a conditional notice, that if both the attesting witnesses to the will are produced, he only intends to cross-examine the witnesses (*Leeman v. George*, 1 L. R. 542; 37 L. J. 13), or if he pleads that the deceased did not know and approve of the contents of the will (*Cleare v. Cleare*, 1 L. R. 655; 38 L. J. 81); but not if he pleads "undue influence or fraud" (*Ireland v. Rendall*, 1 L. R. 194; but see *Cleare v. Cleare*, 1 L. R., 658); and also where he withdraws from the suit without pleading, *Smith v. Fletcher*, 2 L. R. 20.

Where, however, the circumstances of the case would have warranted a decree of costs out of the estate to the next of kin, who had put an executor on proof of a will,

which was established, and the Court was satisfied that he had put the executor on proof of the will, not for the purpose of taking the opinion of the Court upon it, but as ancillary to another suit pending as to real estate, and in the nature of a bill of discovery to get evidence, which might be available on the trial of an issue at common law, it refused him his costs, *Swinfen v. Swinfen*, 1 S. & T. 283; 29 L. J. 153.

The heir at law on same footing in regard to costs as the next of kin.

It would seem to have been the intention of the legislature, by sect. 61 of The Probate Act, 1857, to extend to the heir at law the same privileges with respect to costs as are enjoyed by the next of kin, *Fyson v. Westropp*, 1 S. & T. 279; 29 L. J. 139.

And where the heir at law and an executor of a former will respectively contested the validity of certain testamentary instruments, but pleaded separately and were condemned in the costs of the suit, the Court, on reviewing its decree as to costs, held, that each party was liable in respect to that part of the costs which belonged to its own case. And where costs had been incurred in any matter equally applicable to both parties, so that it could not assign them more to one than to the other, that portion of costs was directed to be taxed equally between them, *Fyson v. Westropp*, 1 S. & T. 279; 29 L. J. 139.

Where a next of kin contested the validity of a will—and the heir-at-law, not having been cited, intervened—and the will was pronounced against on the ground of the incapacity of the deceased, the party propounding the will was condemned in the costs of the next of kin and of the heir-at-law. *Rayson v. Parton*, 2 L. R. 38; 39 L. J. 20.

Interveners.

“Interveners in the Court of Probate possess the same rights and are subject to the same limitations and the same rules, with respect to costs, as they were in the Prerogative Court.” R. 6, C. B.

The grounds upon which interveners will be allowed their costs, relieved from costs, or condemned in costs, must depend upon the circumstances of each particular case.

In ordinary cases, where the executor is before the Court, interveners, supporting the will, will not be allowed their costs out of the estate. *Colvin v. Fraser*, 2 Hagg. 368.

In *Burgoyne v. Showler*, 1 Roberts, 5 (see also *Cross v. Cross*, &c., 3 S. & T. 300; 33 L. J. 49), next of kin intervening, in a question as to the due execution of a will, in order to take the opinion of the Court as to alterations which appeared in the will affecting their interests, were (although the alterations were pronounced invalid) allowed their costs out of the estate.

An intervener allowed his costs.

But where the executor in his affidavit of scripts in effect denied the validity of a legacy to a person who intervened, but, subsequently, by his plea, admitted its validity, and such intervener appeared by counsel at the hearing of the cause, the Court refused to allow him his costs out of the estate. *Shaw v. Marshall*, 1 S. & T. 129.

An intervener refused his costs.

The Court has held, that it has not jurisdiction to order costs to be paid out of real estate. *Young v. Dendy*, 1 L. R. 347. But by a rule of the Court of Chancery, when the decision is for the benefit of the real as well as of the personal estate, and the costs are directed to be paid out of the estate, they are to be paid rateably out of the real and personal estate according to their respective values. *Bennett v. Foster*, 2 Ph. 161. And where, after the termination of the probate suit, the estate is administered in the Chancery Division, that Court has jurisdiction to make an order for the real estate to bear its rateable proportion of the costs of the litigation in the Court of Probate.

Apportionment of costs where decision for the benefit of the real as well as personal estate.

Liability of a Person suing in Formâ Pauperis for Costs.

When a person suing *in formâ pauperis* is unsuccessful in his suit, and his conduct has been vexatious, or such as to expose him to suspicion of fraud or improper acts, the Court may condemn him in costs (*Carless v. Thompson*, 1 S. & T. 21), but it will be a matter of discretion (*Rind v. Davies*, 4 Hagg. 394) whether the Court, unless he should

cease to be a pauper, would proceed to enforce their payment by attachment. In *Wagner v. Mears*, 2 Hagg. 524 (see also *Lemann v. Bonsall*, 1 Add. 389), where a pauper was condemned in costs in the Prerogative Court for vexatious conduct, the Court intimated that it would not enforce the decree against her, unless she should succeed to property.

“Where a pauper omits to proceed to trial, pursuant to notice, he may be called upon by summons to show cause why he should not pay costs, though he has not been dispaupered, and why all future proceedings should not be stayed until such costs are paid.” R. 25, C. B.

Security for Costs.

By Order, 13th Feb. 1830 (2 Hagg. XVI.) it was provided, that, in all cases, the Prerogative Court might, upon application made to it, direct security for costs to be given by either or all the parties.

When a will had been propounded, and an appearance in opposition thereto had been given for the only next of kin of the deceased, who was absent from England, the Court directed that he should, on account of his absence, give security for costs in the sum of 50*l*. *Hillam v. Walker*, 1 Hagg. 72. And where a party who had propounded a will afterwards became bankrupt, he was also directed to find security for costs. *Goldie v. Murray*, 2 Curt. 797.

The Court of Probate, however, on this point adopted the rules of the Courts of common law, and only required security for costs to be given by a plaintiff who was absent from or about to leave the country, but did not require security for costs to be given by a party who was the defendant, or practically the defendant in the suit. *Robson v. Robson*, 3 S. & T. 568; 34 L. J. 6.

Security for
costs refused.

Where a party to a suit, though a foreigner, was in England, and there was no reason to suppose that he was on the point of going away, the Court declined to make an order for security for costs. *Crispin v. Doglieno*, 1 S. & T. 522; 29 L. J. 130.

“ In any cause or matter, in which security for costs is
 “ required, the security shall be of such amount, and be Amount of security for costs.
 “ given at such time or times and in such manner and
 “ form as the judge or a Court shall direct.” Ord. LV.
 (1876), R. 7.

Substantial security, varying according to the requirements of the case, is now required. *Republic of Costa Rica v. Erlanger*, L. R., 3 Ch. D., C. A. 62; 45 L. J., Ch. 743.

“ Where a bond is to be given as security for costs, it Security for costs where given by bond.
 “ shall, unless the Court or a judge otherwise directs, be
 “ given to the party or persons requiring the security, and
 “ not to an officer of the Court.” Ord. LV.

CHAPTER XIV.

APPEALS—JURISDICTION OF THE COURT OF APPEAL—APPEALS FROM FINAL DECREE OR JUDGMENT—APPEALS FROM INTERLOCUTORY ORDERS—DIRECTIONS INCIDENTAL TO APPEALS—NEW TRIALS—TIME WITHIN WHICH THE COURT MAY BE MOVED FOR A RULE NISI—RULES RELATING TO MOVING FOR AND GRANTING NEW TRIALS—APPEALS TO BE RE-HEARINGS—EVIDENCE IN COURT BELOW—RULES RELATING TO THE HEARING OF APPEALS—INTERLOCUTORY ORDERS—CASES WHERE NO APPEAL ALLOWED—CASES WHERE APPEAL ALLOWED WITH THE LEAVE OF THE COURT OR THE JUDGE—CASES WHERE APPEAL ALLOWED AS OF RIGHT—APPEALS FROM COUNTY COURTS TO DIVISIONAL COURTS—APPEALS TO HOUSE OF LORDS—APPELLATE JURISDICTION ACT, 1876—FORMS—METHOD OF PROCEDURE AND STANDING ORDERS OF HOUSE OF LORDS IN REFERENCE TO APPEALS FROM THE HIGH COURT OF JUSTICE.

APPEALS.

A PARTY may appeal from any decision of the Probate Court upon which a final decree or judgment of the Court is or may be founded to the Court of Appeal, and from the Court of Appeal to the House of Lords. A party may appeal from Interlocutory decisions or Orders of the Court, where there is no provision to the contrary, to the Court of Appeal, and from thence to the House of Lords.

Appeals from
High Court.

“The said Court of Appeal shall have jurisdiction and
“power to hear and determine appeals from any judgment
“or order, save as hereinafter mentioned, of Her Majesty’s
“High Court of Justice, or of any judges or judge thereof,
“subject to the provisions of this Act, and to such Rules
“and Orders of Court for regulating the terms and con-
“ditions on which such appeals shall be allowed, as may
“be made pursuant to this Act.

“For all the purposes of and incidental to the hearing
“and determination of any appeal within its jurisdiction,

“and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.” Jud. Act, 1873, sect. 19.

“Every appeal to the Court of Appeal shall, where the subject matter of the appeal is a final order, decree, or judgment, be heard before not less than three judges of the said Court sitting together, and shall when the subject matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two judges of the said Court sitting together. Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal.” Jud. Act, 1875, sect. 12.

Appeals from a final decree to be heard before three judges at least.

Appeals from interlocutory orders to be heard before two judges at least.

“In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single judge of the Court of Appeal; and a single judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof.” Jud. Act, 1873, sect. 52.

Directions incidental to appeals may be given by a single judge of the Court of Appeal.

“No judge of the said Court of Appeal shall sit as a judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was and is a member.” Jud. Act, 1875, sect. 4.

NEW TRIALS.

Where a question of fact has been submitted to a jury either in the Probate Court, or at the Assizes, any party dissatisfied with the verdict of the jury may move

New trials.

Grounds for moving for a new trial.

the judge sitting in the Probate Court for a rule nisi for a new trial on the ground of misdirection, or that the verdict was against the weight of evidence, or for the wrongful admission or rejection of evidence, or on the ground of the judge having left to the jury what he himself ought to have decided, or for his refusing to allow the trial to be postponed or a witness to be recalled, or for default or misconduct of the jury, or on the ground of the applicant having been taken by surprise, or on the ground of the discovery, since the trial, of fresh evidence unknown to and undiscoverable by the party at the time of the trial. See Chitty's *Archbold*, 1449—1461.

From the decision of the judge in the Probate Court refusing the rule nisi for a new trial, or refusing to make it absolute, or making it absolute, an appeal lies to the Court of Appeal, and from thence to the House of Lords.

“Applications for new trials shall be by motion calling “on the opposite party to show cause at the expiration of “eight days from the date of the order, or so soon after “as the case can be heard, why a new trial should not be “directed.” Order XXXIX. R. 1a.

As the Rules under the Judicature Act as to the time within which the motion for a rule nisi is to be made do not apply to the Probate Court, the Rules of the Court of Probate on this subject remain in force.

Time within which the Court may be moved for a rule nisi.

“An application for a new trial of an issue tried before “a jury may be made to the Court by motion within four- “teen days from the day on which the issue was tried, if “the Court be then sitting, if not, on the first motion day “after the expiration of the fourteen days.” R. 59, C. B.

Where the Court had granted a rule nisi for a new trial to a plaintiff, who, after pleading to and contesting the validity of a will, applied for the rule to be discharged, two of the parties cited, who had appeared but not pleaded, were allowed to plead and adopt the proceedings of the plaintiff.

Service of copy of rule nisi.

“A copy of such order shall be served on the opposite

“party within four days from the time of the same being made.” Order XXXIX. R. 2.

“A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appeared to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.” Order XXXIX. R. 3.

Rule only granted where and so far as substantial wrong has been.

“A new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question.” Order XXXIX. R. 4.

A new trial to one of questions only.

“An order to show cause shall be a stay of proceedings in the action, unless the Court shall order that it shall not be so as to the whole or any part of the action.” Order XXXIX. R. 5.

Stay of proceedings.

An appeal from a refusal of the judge of the Probate Court to grant a rule nisi for a new trial must be made to the Court of Appeal within four days from the date of the refusal, or within such enlarged time as a judge of the Court below or of the Appeal Court may allow.

Four days allowed to appeal from a refusal to grant a rule nisi unless time extended.

“Where an *ex parte* application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a judge of the Court below or of the Appeal Court may allow.” Order LVIII. R. 10.

Time for appealing from a refusal of an *ex parte* application.

APPEALS.

An appeal from decisions of the Probate Court on questions of fact left to the determination of the judge or Court without a jury, and on questions of law, lies to the Court of Appeal, and from thence to the House of Lords.

ORDER LVIII.

Appeals to
be a rehear-
ing.

“All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.” R. 2.

Where a cause in the Probate Court has been heard before a judge without a jury, and the evidence has been given *visà voce*, a party may either apply for a rehearing under Rule 60, C. B. 1862, or may treat the judge’s decision on the facts as a final decree in the cause, and appeal from it at once on the facts as well as on the law. *Syden v. Lord St. Leonards*, 1 P. D. 212; 45 L. J. 49.

“An application for a rehearing of a cause heard before the judge without a jury, and in which evidence has been given *visà voce*, may be made by motion within fourteen days from the day on which the same was heard, if the Court be then sitting, if not, on the first motion day after the expiration of the fourteen days.” R. 60, C. B.

How evidence
taken in
the Court
below is to be
brought be-
fore the Court
of Appeal.

“When any question of fact is involved in an appeal, the evidence taken in the Court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows:

“(a) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed.

“(b) As to any evidence given orally, by the production of a copy of the judge’s notes, or such other materials as the Court may deem expedient.” R. 11.

“ Where evidence has not been printed in the Court
 “ below, the Court below or a judge thereof, or the Court
 “ of Appeal or a judge thereof, may order the whole or
 “ any part thereof to be printed for the purpose of the
 “ appeal. Any party printing evidence for the purpose of
 “ an appeal without such order shall bear the costs thereof,
 “ unless the Court of Appeal or a judge thereof shall
 “ otherwise order.” R. 12.

Printing
evidence.

“ The notice of appeal shall be served upon all parties
 “ directly affected by the appeal, and it shall not be
 “ necessary to serve parties not so affected; but the Court
 “ of Appeal may direct notice of the appeal to be served
 “ on all or any parties to the action or other proceeding,
 “ or upon any person not a party, and in the meantime
 “ may postpone or adjourn the hearing of the appeal upon
 “ such terms as may seem just, and may give such judg-
 “ ment and make such order as might have been given or
 “ made if the persons served with such notice had been
 “ originally parties. Any notice of appeal may be amended
 “ at any time as to the Court of Appeal may think fit.”
 R. 3.

Service of
notice of
appeal.

“ Notice of appeal from any judgment, whether final or
 “ interlocutory, shall be a fourteen days' notice, and notice
 “ of appeal from any interlocutory order shall be a four
 “ days' notice.” R. 4.

Length of
notice.

“ The Court of Appeal shall have all the powers and duties
 “ as to amendment and otherwise of the Court of First In-
 “ stance, together with full discretionary power to receive
 “ further evidence upon questions of fact, such evidence
 “ to be either by oral examination in court, by affidavit, or
 “ by deposition taken before an examiner or commissioner.
 “ Such further evidence may be given without special
 “ leave upon interlocutory applications, or in any case as
 “ to matters which have occurred after the date of the
 “ decision from which the appeal is brought. Upon ap-
 “ peals from a judgment after trial or hearing of any

Powers of
Court of Ap-
peal as to
amendment
and fresh
evidence.

- Judgment. “ cause or matter upon the merits, such further evidence
 “ (save as to matters subsequent as aforesaid) shall be ad-
 “ mitted on special grounds only, and not without special
 “ leave of the Court. The Court of Appeal shall have
 “ power to give any judgment and make any order which
 “ ought to have been made, and to make such further or
 “ other order as the case may require. The powers afore-
 “ said may be exercised by the said Court, notwithstanding
 “ that the notice of appeal may be that part only of the
 “ decision may be reversed or varied, and such powers may
 “ also be exercised in favour of all or any of the respon-
 “ dents or parties, although such respondents or parties
 “ may not have appealed from or complained of the deci-
 Costs. sion. The Court of Appeal shall have power to make
 “ such order as to the whole or any part of the costs of the
 “ appeal as may seem just.” R. 5.
- Cross appeal. “ It shall not, under any circumstances, be necessary for
 Notice. “ a respondent to give notice of motion by way of cross
 “ appeal, but if a respondent intends, upon the hearing of
 “ the appeal, to contend that the decision of the Court
 “ below should be varied, he shall, within the time specified
 “ in the next Rule, or such time as may be prescribed by
 “ special order, give notice of such intention to any parties
 “ who may be affected by such contention. The omission
 “ to give such notice shall not diminish the powers con-
 “ ferred by the Act upon the Court of Appeal, but may,
 “ in the discretion of the Court, be ground for an adjourn-
 “ ment of the appeal, or for a special order as to costs.”
 R. 6.
- Length of “ Subject to any special order which may be made,
 notice. “ notice by a respondent under the last preceding Rule
 “ shall in the case of any appeal from a final judgment be
 “ an eight days’ notice, and in the case of an appeal from
 “ an interlocutory order a two days’ notice.” R. 7.
- Entry of “ The party appealing from a judgment or order shall
 appeal. “ produce to the proper officer of the Court of Appeal the

“ judgment or order or an office copy thereof, and shall
 “ leave with him a copy of the notice of appeal to be filed,
 “ and such officer shall thereupon set down the appeal by
 “ entering the same in the proper list of appeals, and it
 “ shall come on to be heard according to its order in such
 “ list, unless the Court of Appeal or a judge thereof shall
 “ otherwise direct, but so as not to come into the paper for
 “ hearing before the day named in the notice of appeal.”

R. 8.

“ If, upon the hearing of an appeal, a question arise as
 “ to the ruling or direction of the judge to a jury or asses-
 “ sors, the Court shall have regard to verified notes or other
 “ evidence, and to such other materials as the Court may
 “ deem expedient.” R. 13.

Notes of evi-
 dence.

“ No interlocutory order or rule from which there has
 “ been no appeal shall operate so as to bar or prejudice the
 “ Court of Appeal from giving such decision upon the ap-
 “ peal as may seem just.” R. 14.

Effect of in-
 terlocutory
 order.

“ An appeal shall not operate as a stay of execution or
 “ of proceedings under the decision appealed from, except
 “ so far as the Court appealed from, or any judge thereof,
 “ or the Court of Appeal, may so order; and no interme-
 “ diate act or proceeding shall be invalidated, except so far
 “ as the Court appealed from may direct.” R. 16.

An appeal not
 to operate as
 a stay of pro-
 ceedings or
 execution.

“ Wherever under these Rules an application may be
 “ made either to the Court below or to the Court of Ap-
 “ peal, or to a judge of the Court below or of the Court of
 “ Appeal, it shall be made in the first instance to the Court
 “ or judge below.” R. 17.

What appli-
 cations to be
 made to the
 Court or
 judge below.

“ Every application to a judge of the Court of Appeal
 “ shall be by motion, and the provisions of Order LIII.
 “ shall apply thereto.” R. 18.

Appeals to be
 brought on
 by motion.

Interlocutory Orders.

There are certain interlocutory orders from which no
 appeal lies. There are others from which no appeal lies,

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except with leave of the judge making the order—and others from which an appeal lies as of right.

Cases where
no appeal
allowed.

There is no appeal from interlocutory orders made by the judge in chambers in the exercise of a discretion vested in him.

Appeals by
leave of judge
or Court.

An appeal from an order made by the judge or Court by the consent of parties, or from an order as to costs, is not allowed, except by leave of the Court or judge making such order.

“No order made by the High Court of Justice, or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order.” Jud. Act, 1873, sect. 49.

Appeals as of
right.

An appeal is allowed, as of right, from an order made by the judge sitting in chambers—not in the exercise of his discretion—to the judge in Court; but no appeal is allowed from an order of the judge in chambers, to set aside which no motion has been made in Court, except by special leave of the judge making the order, or the Court of Appeal.

“Every order made by a judge of the said High Court in chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in Court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal.” Jud. Act, 1873, sect. 50.

An appeal is allowed as of right from an order refusing to grant or granting a new trial.

“Where by Act of Parliament it is provided, that the decision of any Court or judge, the jurisdiction of which

“ Court or judge is transferred to the High Court of Justice is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any judge thereof, to her Majesty’s Court of Appeal.” Appellate Jurisdiction Act, 1876, sect. 20.

Sect. 39 of the Court of Probate Act, 1857, provided that “ any person considering himself aggrieved by any final or interlocutory decree or order of the Court of Probate may appeal therefrom to the House of Lords: provided always that no appeal from any interlocutory order of the Court of Probate shall be made without leave of the Court of Probate first obtained; but on the hearing of an appeal from any final decree all interlocutory orders complained of shall be considered as under appeal as well as the final decree.”

In the Probate Division, as in the Court of Probate, the judge usually, on the termination of a trial by jury, pronounces for or against the will in accordance with the verdict; and the appellant, where this has been done, should in his appeal ask for the decree to be reversed and a new trial granted.

“ No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days. The said period shall be calculated from the time at which the order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.” See Order LVIII. R. 15.

Time for an appeal from interlocutory order.

Appeals from County Courts.

Where a probate or administration action, by reason of the small value of the property of the deceased, has been

commenced in or transferred to a County Court, the appeal would seem, now, under sect. 45 of the Judicature Act, 1873, and Order LVIII. R. 11 (December, 1876), to lie to the Divisional Court from time to time appointed to hear County Court appeals.

Sect. 45.

Appeals from
Inferior
Courts to be
determined
by Divisional
Court.

By sect. 45 of the Judicature Act, 1873, it is enacted, that "all appeals from a County Court, which might, " before the passing of this Act, have been brought to any " Court or judge whose jurisdiction is by this Act trans- " ferred to the High Court of Justice, may be heard and " determined by Divisional Courts of the said High Court " of Justice, consisting respectively of such of the judges " thereof as may from time to time be assigned for that " purpose, pursuant to Rules of Court, or (subject to Rules " of Court) as may be so assigned according to arrange- " ments made for the purpose by the judges of the said " High Court, the determination of such appeals respec- " tively by such Divisional Courts shall be final, unless " special leave to appeal from the same to the Court of " Appeal shall be given by the Divisional Court by which " any such appeal from an inferior Court shall have been " heard."

By Rule 11, of Order LVIII., December, 1876, "every " judge of the High Court of Justice for the time being " shall be a judge to hear and determine appeals from in- " ferior Courts, under sect. 45 of the Supreme Court of " Judicature Act, 1873. All such appeals (except Admi- " ralty appeals from inferior Courts, which, until further " order, shall be assigned as heretofore to the present judge " of the Admiralty Court) shall be entered in one list by " the officers of the Crown Office of the Queen's Bench " Division, and shall be heard by such Divisional Court " of the Queen's Bench, Common Pleas or Exchequer " Division, as the presidents of those Divisions shall from " time to time direct."

APPEALS TO HOUSE OF LORDS.

Appeals to the House of Lords are regulated by the Appellate Jurisdiction Act, 1876, and the Forms, Method of Procedure, and Rules and Standing Orders of the House of Lords.

The Appellate Jurisdiction Act, 1876.

Short title.
39 & 40 Vict.
c. 59.

“This Act shall, except where it is otherwise expressly provided, come into operation on the first day of November, one thousand eight hundred and seventy-six, which day is hereinafter referred to as the commencement of this Act.” Sect. 2.

Commence-
ment of act.

Appeal.

“Subject, as in this Act mentioned, an appeal shall lie to the House of Lords from any order or judgment of any of the courts following; that is to say,

Cases in which
an appeal
lies to House
of Lords from
the High
Court of Jus-
tice of Eng-
land.

“ (1) Of her Majesty’s Court of Appeal in England.”

* * * * *

“Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal.” Sect. 4.

Form of ap-
peal to the
House of
Lords.

“An appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than three of the following persons, in this Act, designated Lords of Appeal; that is to say,

Attendance
of certain
number of
Lords of
Appeal re-
quired at
hearing and
determination
of appeals.

“ (1) The Lord Chancellor of Great Britain for the time being;

“(2) And the Lords of Appeal in Ordinary to be appointed as in this Act mentioned; and

“(3) Such Peers of Parliament as are for the time being holding, or have held, any of the offices in this Act, described as high judicial offices.”
Sect. 5.

Procedure under Act to supersede all other procedure.

“After the commencement of this Act, error shall not lie to the House of Lords, and an appeal shall not lie from any of the Courts from which an appeal to the House of Lords is given by this Act, except in manner provided by this Act, and subject to such conditions as to the value of the subject matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords.” Sect. 11.

Appellate Jurisdiction Act, 1876.

Form of appeal (Standing Order, No. I.)

* *Note.*—The schedule must set out the title of, and parties to the cause or matter; and the decrees, orders, judgments, or interlocutors appealed against, and where the appeal is not against the whole decree the part appealed against must be defined.

FORM OF APPEAL, METHOD OF PROCEDURE, AND STANDING ORDERS APPLICABLE TO ALL APPEALS PRESENTED TO THE HOUSE OF LORDS ON AND AFTER THE 1ST DAY OF NOVEMBER, 1876.

To the right honourable the House of Lords.

The humble petition and appeal of A. (*set forth the address of the appellant*).

Your petitioner humbly prays that the matter of the order (*or orders, or judgment, or interlocutor*), set forth in the schedule hereto* (*or, so far as therein stated to be appealed against*) may be reviewed before her Majesty the Queen in her Court of Parliament, and that the said order (*or, so far as aforesaid*) may be reversed, varied, or altered, or that the petitioner may have such other relief (*if specific relief be desired, it can be so stated in the prayer*) in the premises as to her Majesty the Queen, in her Court of Parliament, may seem meet; and that (*here name the respondents*) mentioned in the schedule to the appeal may be ordered to lodge such printed cases as they may be advised, and the circumstances of the cause may require, in answer to this

appeal; and that service of such order on the solicitors in the cause of the said respondents may be deemed good service.

*To be signed by two counsel.**
(Here insert schedule.)

Standing
Order, No. II.
(certificate of
counsel).

FORM OF SCHEDULE.

From her Majesty's Court of Appeal (*England*).

In a certain cause (*or matter*) wherein A. was plaintiff and B. was defendant. (*The names of all parties to the appeal, whether original plaintiffs or defendants in the cause, or added by subsequent orders, must be here set forth*).

The order of (*state Court and date of order*) appealed from is in the words following, viz. (*set forth, in italics THROUGHOUT, the whole of the order appealed from †*) (*or, when the order is appealed from in part only*): The order of (*state Court and date of order*) referred to in the above prayer is in the words following, the portion complained of being printed in italics (*set forth order, the PORTION complained of being printed in italics, the portion not complained of being printed in Roman type*).†

We humbly conceive this to be a proper case to be heard before your lordships by way of appeal.

*To be signed by two counsel.**

I, _____, clerk to Messrs. _____, of _____, solicitors for the appellants within named, hereby certify that on the _____ day of _____ I served Messrs. _____ of _____ solicitors for _____, the within-named respondents, with a correct copy of the foregoing appeal, and with a notice that on the _____ day of _____, or as soon after as conveniently may be, the petition of appeal would be presented to the House of Lords on behalf of the appellant.

Standing
Order, No. II.
Certificate of
notice to re-
spondents to
be written on
the last page
of the appeal

DIRECTIONS FOR AGENTS.

N.B.—*All documents must be lodged in the Parliament Office before three o'clock on the day of presentation.*

METHOD OF PROCEDURE.

The appeal must be printed on parchment (*quarto size*).

Two clear days' notice of the intention to present the appeal, together with a correct copy of the appeal,‡ must be served on the respondents or their solicitors prior to presentation, and a certificate of such service entered on the appeal as above.

Presentation
of the appeal.

* The autograph signatures must be shown to the clerks of the judicial department at the time of lodging the appeal.

† Where several orders are appealed from, *each* order must be headed with a statement of the court and the date of the order.

‡ It will be found convenient that the appellant's agent should supply the other side with at least five additional printed copies of the appeal.

Order of service,—see Standing Order, No. III.

Security for costs,—see Standing Order, No. IV., and also Standing Order, No. VII., with regard to expiry of time during recess. Recognizance.

Bond.

The appeal, together with four printed paper copies, may then be lodged in the parliament office,* and if the House be then sitting, or if not, on the next ensuing meeting of the House, the appeal will be presented to the House, and an order made requiring the respondents to lodge cases in answer to the appeal. This order will be issued † to the appellants' agent for service on the respondents or their solicitors, and the same, together with an affidavit ‡ of due service entered *thereon*, must be returned to the parliament office *within* the period granted to the appellant for lodging his printed cases under Standing Order No. 5.

The several periods limited by the Standing Orders take effect from the date of the *presentation* of the appeal to the House which is the date at the head of the order of service.

Security for costs is given by recognizance to the amount of £500, and a bond for £200. In lieu of the bond, payment may be made of £200 into the fee fund of the House of Lords *within* one week after the *presentation* of the appeal to the House. (All drafts and cheques to be made payable to "House of Lords Fee Fund," and to be crossed "Bank of England, Western Branch.")

The *recognizance* must be entered into by each appellant, where there are more than one. (It is usual to issue the recognizance for execution by the appellant at the time of the issue of the bond.) In the event of a *substitute* being proposed, the name of such substitute, together with a certificate of sufficiency by the solicitor or agent of the appellants, must be lodged in the parliament office within one week after the *presentation* of the appeal to the House; two clear days' notice of the name so proposed, together with a copy of the certificate, having been previously given to the agent of the respondents. For form of certificate and notice see Appendix A. §

The *bond* must be entered into by two sufficient sureties to the satisfaction of the clerk of the parliaments. The names of the proposed sureties, together with a certificate of sufficiency by the solicitor or agent of the appellants, must be lodged in the parliament office within one week after the *presentation* of the appeal to the House; two clear days' notice of the names so proposed, together with a copy of the certificate, having been previously given to the agent of the respondents. For form of certificate and notice see Appendix A. §

* On the lodgment of the appeal, the appellant's agent should state whether the recognizance is to be entered into by the appellants in person or by substitute; also, if possible, whether the *bond* for £200 will be entered into or the money deposited.

† In Scotch appeals, when the "order of service" is desired on the day of presentation for the purpose of staying execution below, the appeal must be lodged in the parliament office not later than *one o'clock* on the day of presentation, accompanied by a letter from the agent stating that the "order" is required for the purpose of staying execution.

‡ Affidavit to be sworn before a commissioner duly appointed to administer oaths in England or Ireland or a justice of the peace in Scotland.

§ Forms to be filled up can be obtained on application to the judicial department.

At the termination of one week from the lodgment of the above certificates, the *bond* and *recognizance* are issued to the solicitor or agent of the appellants for execution before a commissioner appointed to administer oaths in the Supreme Court of Judicature in England or in Ireland, or before a justice of the peace in Scotland.

Execution of
recognizance
and bond.

The bond and the recognizance (whether entered into by the appellants or by a substitute) *must* be returned to the parliament office within one week from the date of the issue thereof to the solicitor or agent of the appellants.

Return of
recognizance
and bond.

If objection be taken by the respondent to the sureties or substitute proposed by the appellant, the respondent's agent must address a letter to the clerk of the parliaments setting forth the nature of the objection. This letter must be lodged in the parliament office within one week from the lodgment of the certificates of sufficiency in the parliament office.

Objection to
sureties or
substitute.

In the event of the sureties or substitute not being deemed satisfactory by the clerk of the parliaments, the appellants are required, within three weeks after the presentation of the appeal, to present a petition to the House in the matter of the bond or recognizance, and at the same time lodge in the parliament office an affidavit or affidavits by the proposed sureties or substitute setting forth specifically the nature of the property in consideration of which they claim to be accepted as sureties or substitute in respect of the bond and recognizance, and also declaring that the property in question is unincumbered. A copy of the affidavit or affidavits must be served on the agent of the respondents before lodging the same in the parliament office. If the respondents desire to file counter affidavits, the same should be lodged with as little delay as possible, copies being served on the agent of the appellants.

Petition, and
affidavits of
justification.

The solicitors of those respondents who purpose lodging printed cases in answer to the appeal should attend at the parliament office for the purpose of ascertaining the due execution of the recognizance and bond, and entering their names in the appearance book. (Notice of the meeting of the appeal committee is sent only to solicitors who have thus entered appearance in the cause.)

Appearance
on behalf of
respondents.

Petitions presented in *incidental* applications are required to be engrossed on *foolscap*, *bookwise*; with regard to petitions in which an assent cannot be obtained, two clear days' previous notice of the intention to present, together with a copy of the petition, must be served on the opposing agent, and a *duplicate* of the petition must be lodged in the parliament office, together with the original petition. The form of a petition for extension of time to lodge the appellant's cases is given in Appendix C.

Incidental
petitions.
Duplicate
required
where assent
is not given.

Forms of petitions (subject to modification, if required), for the restoration of an appeal, for leave to sue in *formâ pauperis*, for revivor, and for withdrawal of an appeal, can be obtained from the judicial department. It will be found advisable in exceptional cases to submit a draft of the petition to the clerks of the judicial department.

Counsel are not heard before the appeal committee. All affidavits intended to be used in the appeal committee must be lodged with the op-

Appeal com-
mittee.
Counsel not
heard.
Affidavits.

Printed cases and appendix, and "setting down" cause for hearing,—see Standing Order, No. V.: and also Standing Order, No. VII. with regard to expiry of time during recess.

Preparation of appendix.

Respondent's additional documents.

Signature of counsel to case,—see Standing Order, No. V.
Form of printed case.

posing agent within a reasonable time before the meeting of the committee, but are not to be filed in the parliament office.

In English appeals six weeks' time, and in Irish and Scotch appeals eight weeks' time, from the date of the presentation of the appeal, is granted to all parties to lodge printed cases and the appendix thereto. These periods, when expiring during a recess of the House, are extended by Standing Order No. VII.*

In appeals in which the parties are able to agree in their statement of the subject-matter, it is optional to lodge a *joint* case with reasons *pro* and *con.*, following the practice heretofore in use in common law appeals on a special case.

It is obligatory on the appellant, within the respective periods so limited as above, to lodge his printed cases, or the joint case before mentioned, and a printed appendix consisting of such documents, or parts thereof, used in evidence in the court below, as may be necessary for reference on the argument of the appeal in support of his case. This appendix will be for the use of both parties on the hearing of the appeal. (See following paragraph with regard to the printing of *additional* documents by the respondent.)

It is the duty of the appellant, with as little delay as possible after the presentation of the appeal, to furnish to the respondent a list of the proposed documents, and in due course a proof copy of the appendix. The proof is to be examined with the original documents by the respective solicitors of the parties. (Ten copies of the appendix, as soon as printed, to be delivered to the solicitor of the respondent.) The respondent is allowed to print any *additional* documents, used in evidence in the court below, which may be necessary for the support of his case on the argument of the appeal, such documents to be **paged consecutively** with the appendix, in order that the same may be eventually *bound* up with the appendix, and form *one* document for the use of the House on the hearing of the appeal. (The proof to be examined, as aforesaid, by the respective solicitors, and prints delivered to the solicitor of the appellant.)

The costs incurred in printing the appendix will, in the first instance, be borne by the appellant, and the costs of the *additional* documents by the respondent, but these costs will ultimately be subject to the decision of the House with regard to the costs of the appeal.

The printed case must be signed by one or more counsel who shall have attended as counsel in the court below, or shall purpose attending as counsel on the argument at the bar.

The case and appendix must be printed quarto size, with seven or eight letters in the margin for facilitating reference, and should be submitted *in proof* to the clerks in the judicial office.

* *Note.*—Petitions for extension of time, *lodged during the prorogation of parliament* (unless the House of Lords be sitting for judicial business), in cases in which time has been *already extended* on petition, do not prevent the dismissal of an appeal.

Where reference is made to a document printed in the appendix, the case must contain a marginal note of the page of the appendix containing such document. The appendix must contain an index to the documents therein.

Forty copies of each case and appendix are required to be lodged in the parliament office to comply with Standing Order No. V.; and subsequently, on the lodgment of the respondent's case, ten *bound* copies (*see directions in the Appendix hereto as to binding printed cases, appendix, additional documents, and printed copies of the appeal for the use of the House on the hearing of the appeal*).

A respondent can only be heard at the bar on a printed case. If the respondent's case is not lodged within the time specified in the order of service, the cause is, on the lodgment of the appellant's case and the appendix, "set down for hearing *ex parte*;" but the respondent may nevertheless at any time afterwards lodge his printed case, and thus put himself in the same position as if he had lodged it within the time specified in the order of service. When, however, the lodgment has been delayed until a day for hearing the cause has been actually appointed, the respondent is required to petition for leave to lodge his printed case, and submit to whatever order the House may make on his petition.

After the lodgment of the printed cases by the appellants and respondents, the respective cases are to be exchanged at the offices of the solicitors; the respondents' agent supplying the appellants' agent with the additional number of cases required for the *bound* copies.

As soon as the printed cases of all parties and the appendix thereto have been lodged, it is optional for either side to set down the cause for hearing, but it is *obligatory* on the appellant, upon the lodgment of his printed cases and the appendix, to set down the cause for hearing within the time limited by Standing Order No. V. (*ex parte* as to those respondents who have not already lodged printed cases, upon proof, by affidavit, of the due service of the before-mentioned "order of service" upon the respondents or their solicitors). A respondent who has lodged his printed cases, is at liberty to set down the cause for hearing on the first *sitting* day after the expiration of the time limited by the standing order for lodging printed cases.

At the time of setting down the cause for hearing, the agent is required to supply a reference to the report of the cause in the court below, or, if the cause be not reported, a short note of the subject-matter.

The cause will then be ripe for hearing, and will take its position on the effective cause list.

On the hearing of an appeal, the agents are required to have the *originals* (or such copies thereof as were accepted in evidence in the court below in lieu of the originals) of all documents set forth in the printed case and appendix in readiness below the bar, in case the House desires to refer to such originals or accepted copies (see following paragraphs as to exception with regard to Irish and Scotch appeals).

In Irish appeals, in cases in which the original documents are filed in

Number of printed cases required to be lodged by the appellant and respondent.

Setting down for hearing *ex parte*. Subsequent lodgment of respondent's case.

Exchange of printed cases.

Setting down cause for hearing.

Reference to report of cause in Court below.

Hearing of the appeal. Documents printed in the case and appendix.

Irish appeals.

the Irish courts, and cannot be readily procured, office copies, duly signed by the proper officer of the court from whence they issue, as certifying the correctness of the same, must be in readiness below the bar on the hearing of the appeal (subject always to the production of the originals, if required by the House).

In Scotch appeals, a copy of the record, duly certified by the proper officer of the court below, must be lodged with the pursebearer of the lord chancellor a few days before the hearing of the appeal. Subject to special direction by the House, the originals of documents contained in the record are not required to be at the bar.

Costs—see Standing Order, No. X., and directions as to the taxation of costs, Appendix E.

Directions as to the sum of 200*l.* under Standing Order, No. IV.

Appeals affirmed.

Forms of bills of costs relating to appeal cases may be obtained at the office for the sale of printed papers, House of Lords.

In all cases where the appellant has paid in the sum of 200*l.* as directed by Standing Order No. IV., and where the House shall make any order for payment of costs by the appellant to the respondent, the clerk of the parliaments or clerk assistant shall pay over to the respondent or his agent the said sum of 200*l.*, or so much thereof as will liquidate the amount reported to the clerk of the parliaments or clerk assistant by the taxing officer, as being due from the appellant to the respondent in respect to the appeal. And in all cases where the amount so reported by the taxing officer shall exceed 200*l.*, the clerk of the parliaments or clerk assistant shall in his certificate credit the appellant with the 200*l.* so paid over to the respondent. And where there be two or more respondents entitled to their separate costs, the said 200*l.* shall be divided between the respondents in proportion to the amount of costs reported by the taxing officer to be due to each respondent. And where, after satisfying the order of the House, there be any sum remaining, part of the said 200*l.*, the same shall be paid back to the appellant or his agent upon a proper receipt for the same being given to the clerk of the parliaments or clerk assistant.

Appeals reversed.

In all cases in which the appellant is not ordered to pay the costs of the appeal, the clerk of the parliaments or clerk assistant shall, on receiving a proper receipt for the same, pay back to the appellant or his agent the said sum of 200*l.*

Appeals dismissed for want of prosecution.

In cases in which an appeal is dismissed for want of prosecution, the appellant shall be at liberty to serve a notice of such dismissal according to the form set forth in Appendix D. upon the agent of the respondents, (such service to be verified, if necessary, by affidavit,) and unless the respondent shall, within four weeks from the date of such service, if the House be sitting at the expiration of the said four weeks, or, if not, then not later than the third sitting day of the next ensuing sittings of the House, lodge in the office of the taxing officer of the House a copy of his bill of costs, the clerk of the parliaments or clerk assistant shall, upon a proper receipt for the same being given, repay to the appellant or his agent the said sum of 200*l.* In the event of the respondent so lodging his bill of costs as aforesaid, the taxing officer may, if the sum demanded by the

respondent be less than 200*l.*, tax the same; and the clerk of the parliaments or clerk assistant shall pay over to the respondent or his agent so much of the said sum of 200*l.* as will liquidate the amount reported to the clerk of the parliaments or clerk assistant as being due from the appellant to the respondent in respect of the appeal, and the remaining portion of the said sum of 200*l.* shall be paid back to the appellant or his agent upon a proper receipt for the same being given to the clerk of the parliaments or clerk assistant.

SUMMARY OF ORDINARY PROCEDURE IN APPEALS.

(For full instructions see foregoing "*Directions for Agents*" and the *Standing Orders*.)

1. A proof copy of the petition of appeal may, when deemed necessary, be submitted to the clerks of the judicial department.
2. Lodgment of appeal, printed on parchment, together with four paper copies thereof, in the parliament office for presentation to the House,—intimation with regard to recognizance and bond.
3. Issue to appellant's agent of "order of service."
4. Payment of 200*l.*, or lodgment of certificate with regard to bond; and lodgment of certificate with regard to substitute for recognizance.
5. Issue to appellant's agent of recognizance and bond for execution.
6. Return of recognizance and bond.
7. Attendance of respondent's agent to enter appearance, and inspect recognizance and bond.
8. Return of "order of service," with affidavit entered thereon.
9. Lodgment of forty printed cases and appendix. A proof copy of the case may, when deemed necessary, be submitted to the clerks of the judicial department.
10. Setting down cause for hearing,—reference to report of cause in the court below.
11. Lodgment of ten bound cases, &c. by appellant.
12. Hearing of appeal, directions as to original documents.

STANDING ORDERS APPLICABLE TO ALL APPEALS PRESENTED TO THE HOUSE OF LORDS ON OR AFTER THE 1ST DAY OF NOVEMBER, 1876.

STANDING ORDER I.

(*Standing Order I. is only applicable to Decrees, &c. pronounced on and after the 1st day of November, 1876.*)

Ordered, that, except where otherwise provided by statute, no petition of appeal be received by this House unless the same be lodged in the parliament office for presentation to the House within one year from the date of the last decree, order, judgment, or interlocutor appealed from.

Time limited
for presenting
appeals.

In cases in which the person entitled to appeal be within the age of one and twenty years, or covert, *non compos mentis*, imprisoned, or out of Great Britain and Ireland, such person may be at liberty to present his appeal to the House, provided that the same be lodged in the parliament office within one year next after full age, discovery, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland: but in no case shall any person or persons be allowed a longer time, on account of mere absence, to present an appeal, than five years from the date of the last decree, order, judgment, or interlocutor appealed against.

STANDING ORDER II.

Appeals to be signed and certified by counsel.

Ordered, that all petitions of appeal be signed, and the reasonableness thereof certified, by two counsel who shall have attended as counsel in the court below, or shall purpose attending as counsel at the hearing in this House.

STANDING ORDER III.

“Order of service.”

Ordered, that the “order of service” issued upon the presentation of an appeal for service on the respondent or his solicitor, be returned to the parliament office, together with an affidavit of due service entered thereon, within the time limited by Standing Order No. V. for the appellant to lodge his printed cases, unless within that period all the respondents shall have lodged their printed cases; in default, the appeal to stand dismissed.

STANDING ORDER IV.

Security for costs.

Ordered, in all appeals that the appellant or appellants do give security to the clerk of the parliaments by recognizance to be entered into, in person or by substitute, to the Queen of the penalty of five hundred pounds, conditioned to pay to the respondent or respondents all such costs as may be ordered to be paid by the House in the matter of the appeal; and further, that the appellant or appellants do procure two sufficient sureties, to the satisfaction of the clerk of the parliaments, to enter into a joint and several bond to the amount of two hundred pounds, or do pay in to the account of the fee fund of the House of Lords the sum of two hundred pounds: such bond, or such sum of two hundred pounds, to be subject to the order of the House with regard to the costs of the appeal: Ordered, that within one week after the presentation of the appeal the appellant or appellants do pay in to the account of the fee fund of the House of Lords the said sum of two hundred pounds, or submit to the clerk of the parliaments the names of the sureties proposed to enter into the said bond; and, in the event of a substitute being proposed to enter into the said recognizance, the name of such substitute; two clear days’ previous notice of the names so proposed for bond and recognizance to be given to the solicitor or agent of the respondent: Ordered, that, in the event of such sureties or such substitute not being deemed satisfactory by the clerk of the parliaments, the appellant or appellants shall, within three weeks after the presentation of the appeal

present a petition to the House in the matter of the said bond or recognizance: Ordered, that the said bond and the recognizance (whether entered into by the appellants or by a substitute) be returned to the parliament office duly executed within one week from the date of the issue thereof to the solicitor or agent of the appellant or appellants. On default by the appellant or appellants in complying with the above conditions, the appeal to stand dismissed.

STANDING ORDER V.

1. Ordered, that in English appeals the printed cases and the appendix thereto be lodged in the parliament office within six weeks from the date of the presentation of the appeal to the House; in Scotch and Irish appeals, within eight weeks; and the appeal set down for hearing on the first *sitting* day after the expiration of those respective periods (or as soon before, at the option of either party, as all the printed cases and the appendix shall have been lodged); on default by the appellant the appeal to stand dismissed.

Printed cases, time limited for lodging, and for setting down the cause for hearing.

2. Ordered, that in all appeals from Scotland the appellant alone, in his printed case or in the appendix thereto, shall lay before this House a printed copy of the record as authenticated by the lord ordinary; together with a supplement containing an account, without argument or statement of other facts, of the further steps which have been taken in the cause since the record was completed, and containing also copies of the interlocutors or parts of interlocutors complained of; and each party shall in their cases lay before the House a copy of the case presented by them respectively to the Court of Session, if any such case was presented there, with a short summary of any additional reasons upon which he means to insist; and if there shall have been no case presented to the Court of Session, then each party shall set forth in his case the reasons upon which he founds his argument, as shortly and succinctly as possible.

Scotch appeals.

3. Ordered, that all printed cases be signed by one or more counsel, who shall have attended as counsel in the court below, or shall purpose attending as counsel at the hearing in this House.

Printed cases to be signed by counsel.

STANDING ORDER VI.

Ordered, that all cross appeals be presented to the House within the period allowed by Standing Order No. V. for lodging cases in the original appeal.

Cross appeals.

STANDING ORDER VII.

Ordered, with regard to appeals in which the periods severally dating from the presentation of the appeal under Standing Orders Nos. III., IV., V., and VI. expire during the recess of the House, that such periods be extended to the third sitting day of the next ensuing meeting of the House.

Expiry of time during recess

STANDING ORDER VIII.

Supplemental cases to be delivered in where appeals are revived or parties added.

Ordered, that where any party or parties to an appeal shall die pending the same, subsequently to the printed cases having been lodged, and the appeal shall be revived against his or her representative or representatives as the person or persons standing in the place of the person or persons so dying as aforesaid, a supplemental case shall be lodged by the party or parties so reviving the same respectively, stating the order or orders respectively made by the House in such case.

The like rule shall be observed by the appellant and respondent respectively, where any person or persons, party or parties in the court below, have been omitted to be made a party or parties in the appeal before this House, and shall, by leave of the House, upon petition or otherwise, be added as a party or parties to the said appeal after the printed cases in such appeal shall have been lodged.

STANDING ORDER IX.

Scotch appeals.

Certificate of leave or difference of opinion to be signed by counsel on appeals.

Ordered, that when any petition of appeal shall be presented to this House from any interlocutory judgment of either division of the Lords of Session in Scotland, the counsel who shall sign the said petition, or two of the counsel for the party or parties in the court below, shall sign a certificate or declaration, stating either that leave was given by that division of the judges pronouncing such interlocutory judgment to the appellant or appellants to present such petition of appeal, or that there was a difference of opinion amongst the judges of the said division pronouncing such interlocutory judgment.

STANDING ORDER X.

Taxation of costs.

Ordered, that the clerk of the parliaments shall appoint such person as he may think fit as taxing officer, and in all cases in which this House shall make any order for payment of costs by any party or parties in any cause without specifying the amount, the taxing officer may, upon the application of either party, tax and ascertain the amount thereof, and report the same to the clerk of the parliaments or clerk assistant: And it is further ordered, that the same fees shall be demanded from and paid by the party applying for such taxation for and in respect thereof as are now or shall be fixed by any resolution of this House concerning such fees; and the taxing officer may, if he think fit, either add or deduct the whole or a part of such fees at the foot of his report: And the clerk of the parliaments or clerk assistant may give a certificate of such costs, expressing the amount so reported to him as aforesaid, and in his certificate regard shall be had to the sum of 200*l.* where that amount has been paid in to the account of the fee fund of the House as directed by Standing Order No. IV.: and the amount in money certified by him in such certificate shall be the sum to be demanded and paid under or by virtue of such order as aforesaid for payment of costs.

APPENDIX A.

(CERTIFICATE OF SUFFICIENCY OF SURETIES, &C.)

Lodged in the Parliament Office on the day of 18 .
In the House of Lords.

“A. and others *v.* B. and others.”

In compliance with Standing Order No. IV., I (we) submit the names of (*full name*) of (*address*) and (*full name*) of (*address*) { as fit and proper sureties } to enter into the { bond } thereby required: and proper substitute }
I (we) certify that, in { my } belief, the said (*full name*) and the said (*full name*) { are each } worth upwards of { 200*l.* } over and above { their } just debts. { is } { 500*l.* } { his }

This certificate may be signed by the country solicitor or agent of the appellants.

I (we) certify that a copy of the above certificate, with two clear days' notice of the intention to lodge the same in the parliament office, has been served on the solicitors or agents of the respondents.

To be signed by the London solicitor or agent of the appellants.

APPENDIX B.

(DIRECTIONS FOR BINDING PRINTED CASES AND PRINTED COPIES OF THE
APPEAL FOR THE USE OF THE LAW LORDS.)

1. Ten copies bound in purple cloth; two of the ten to be interleaved, as regards the cases only.
2. Short title of cause on the back.
3. Label on side, stating short title of cause and contents of the volume, thus:—

“A—— and others *v.* B—— and others.”

Printed copy of the appeal.

Appellants' case.

Respondent B.'s case.

Respondent C.'s case.

Appendix (consisting of the appendix lodged by the appellant, and the *additional* documents, if any, lodged by the respondent.

4. The volume to be indented, and the names of the parties written on the indentations to their respective cases.
5. References to the reports of the cause in the courts below, or the words “not reported” to be written on the fly sheet.
6. The bound copies to be lodged immediately after the respondents' cases are delivered in.

In dealing with bulky cases, it may be found advisable to bind the Appendix as a separate volume.

It is the duty of the appellant's agent to carry out these directions.

APPENDIX C.

(PETITION FOR EXTENSION OF TIME TO LODGE CASES, &C.)

(To be engrossed on foolscap paper, and (unless assent of respondent's agent be obtained) a copy, and two clear days' notice of intention to present, must be given to respondent's agent, and the original petition, and a duplicate thereof, lodged in the Parliament Office.)

In the House of Lords,

(Insert Short Title of Cause.)

To the right honourable the House of Lords.

The humble petition of the appellants

Sheweth,

That your petitioner presented petition of appeal on the day of complaining of *(insert dates of orders or interlocutors complained of)*.

That the time allowed by Standing Order No. V. (*or*) extended by your lordships' order of the *(state date)* for the appellants to lodge his printed cases and the appendix, will expire on the *(state date)*.

That your petitioner *(set forth cause of delay)*.

Your petitioner therefore humbly prays that your lordships will be pleased to grant him an extension of time until *(specify the date to which extension of time is required)* to lodge his printed cases, and the appendix, and set down the cause for hearing.

And your petitioner will ever pray.

, agents for the appellants.

We consent to the prayer of the above petition.

, agents for the respondents.

APPENDIX D.

(FORM OF NOTICE TO THE RESPONDENT OR HIS AGENT WITH REGARD TO THE APPLICATION OF THE APPELLANT FOR REPAYMENT OF THE SUM OF £200 UNDER STANDING ORDER NO. IV.)

In the House of Lords.

A. . . . Appellant.

B. . . . Respondent.

(Appeal lately depending in the House of Lords.)

Take notice that the above appeal has been dismissed for want of prosecution, and that the appellant intends to apply to the clerk of the parliaments for repayment of the sum of £200 paid by him into the House of Lords Fee Fund under Standing Order No. IV. The respondent is required by the rules of the House, if any costs have been incurred by him in respect of the appeal, to lodge with the taxing officer of the House a copy of his bill of costs within four weeks from the date of the service of this notice upon the respondent or his agent, if the House of Lords be then sitting, or not later than the third day on which the House shall sit

after the expiration of the said four weeks ; and in default, the clerk of the parliaments will be at liberty forthwith to repay to the appellant the said sum of £200.

APPENDIX E.

TAXATION OF COSTS.

COSTS TAXABLE BY THE TAXING OFFICER OF THE HOUSE OF LORDS, AND MODE OF PROCEEDING.

The costs taxable by the taxing officer of the House of Lords are—

Private bills.

All costs, charges, and expenses, including the expenses of witnesses, of and incidental to the preparation, bringing in, and carrying through Parliament any railway or other local and personal bill and any estate or other private bill, or any provisional order or provisional certificate, and the costs, charges, and expenses incurred in opposing any such bill, provisional order, or provisional certificate.—Such costs are taxed either under the provisions of the 12 & 13 Vict. c. 78, and the 28 & 29 Vict. c. 27, or upon a requisition of one of her Majesty's principal secretaries of state, or by the local government board, or upon a requisition from either of the courts in England, Ireland, or Scotland, or at the request of the parties interested in the same.

Provisional
Orders, &c.

All costs, charges, and expenses of or incidental to appeal cases in the House of Lords.—Such costs are taxed under an order or judgment of the House, and in pursuance of a Standing Order, or upon a requisition from either of the courts, or at the request of the parties interested in the same ; such costs being taxed either as between *party and party*, or as between *solicitor and client*, as the case may require.

Appeal cases.

All costs, charges, and expenses, including the expenses of witnesses, of and incidental to establishing claims to peerages and claims to vote.—Such costs are taxed upon a requisition from either of the courts or at the request of the parties interested in the same.

Expenses of
witnesses,
claims to
peerages, &c.

The Mode of Proceeding.

When the costs are to be taxed under the provisions of 12 & 13 Vict. c. 78, a copy of such costs, with an indorsement thereon stating that a copy of such costs had been duly served upon A. and B., who are the parties liable to pay the same, and requesting an appointment to tax, must be deposited in the taxing office of the House of Lords, and due notice of an appointment to tax will be sent from the taxing office to each party.

When costs are to be taxed under the provisions of 28 & 29 Vict. c. 27, a copy of such costs (*with an indorsement thereon stating that the provisions of section 3 of the above act so far as the same relate to the delivery of the bill of costs to the party chargeable with the same, have been complied with, and requesting an appointment to examine and tax the same*) must be deposited in the taxing office ; and such application must be made to the taxing officer within the time limited by the said section of the said act.

The bills of costs which are referred by either of the courts are usually exhibits in the court by which they are referred, in which case there is

indorsed on the back of the original bill a requisition in the following words :

The master of the rolls, chief clerk, taxing master of the Chancery Division of the High Court of Justice (or as the case may be) requests the taxing officer of the House of Lords to tax the within bill of costs, and to report to him the amount at which he has allowed the same.

(Signed) A. B.

NOTICE.

Any parliamentary agent, attorney, solicitor, or other person applying for the taxation of any bill of costs, charges, and expenses incurred by him in promoting or opposing any private bill, provisional order, or provisional certificate in parliament, is desired to deposit in the office of the taxing officer, at the time of making such application, a copy of such bill of costs, charges, and expenses, with the several items added up and the amount ascertained and set out, together with a declaration signed by him stating that such bill of costs, charges, and expenses has been duly delivered to the parties charged therewith (naming the parties), in conformity with the Taxation of Costs Acts, 1847 and 1849, or the Act for Awarding Costs, 1865, as the case may be.

Any application for such taxation should, in the first instance, be made to the taxing officer of the House in which the bill to which the same relates commenced, or opposition had, or in which costs have been awarded in pursuance of the Act for Awarding Costs, 1865.

Taxing Office, House of Lords,
February 1st, 1876.

COSTS RELATING TO APPEALS TAXED UNDER A JUDGMENT OR ORDER OF THE HOUSE AND STANDING ORDER No. 10.

Applications must be made by depositing in the office of the taxing officer a copy of the bill of costs, with an endorsement thereon stating that "a copy of this bill of costs was on the day of served on " A. B., the agent for the appellant or the respondent, as the case may " be, and we hereby request that an appointment may be made to tax " the same."

Dated this day of 187 .

A. B.,

Agent for the appellant or respondent
(as the case may be).

To the

Taxing officer of the House of Lords.

NOTE.—The Taxing office is open throughout the session, and from the first Monday in the month of December in each year.

Taxing Office, House of Lords,
10th June, 1879.

B. S. R. ADAM,
Taxing Officer.

Printed forms of bills of costs, to be adopted by attornies and solicitors having charge of appeal cases in the House of Lords, may be obtained at the office for the sale of printed papers, House of Lords.

CHAPTER XV.

CHANGE OF PARTIES TO ACTIONS BY DEATH, ETC., ORDER L.—TRANSFER OF ACTIONS TO OTHER DIVISIONS OF THE HIGH COURT—CONSOLIDATION OF ACTIONS, ORDER LI.—MOTIONS AND OTHER APPLICATIONS, ORDER LII.—NOTICES AND PAPERS, ORDER LVI.—TIME, ORDER LVII.—EFFECT OF NON-COMPLIANCE WITH RULES, ORDER LIX.—APPLICATIONS AT CHAMBERS, ORDER LIV.—FORMS OF SUMMONSES, AND OF ORDERS AT CHAMBERS—RULES AS TO TAXATION OF COSTS, AUGUST, 1875—ORDER AS TO COURT FEES ACT, 1875—MODES OF ENFORCING DECREES OR ORDERS FOR PAYMENT OF MONEY OR OTHER ORDERS OF THE COURT OR JUDGE—WRITS, FI. FA. AND ELEGIT, ORDER XLIII.—WRIT OF SEQUESTRATION, ORDER XLVII.—ATTACHMENT, ORDER XLIV.—WRITS IN AID—FORMS OF WRITS—GENERAL RULES AS TO THE ISSUE, FORMS AND EXECUTION OF WRITS, ORDER XLII.—ENFORCEMENT OF DECREES OR ORDERS FOR PAYMENT OF MONEY BY ATTACHMENT OF DEBTS, ORDER XLIV.; AND BY CHARGING ORDER AND DISTINGAS, ORDER XLVI.—CENTRAL OFFICE, LXA.—SITTINGS AND VACATIONS, ORDERS LIX., LXI.—INTERPRETATION OF TERMS, ORDER LXIII.

ORDER L.

Change of Parties by Death, &c.

“An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*.” R. 1.

“In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if

No abatement on marriage, death, or bankruptcy, or assignment of interest.

Power to add parties.

- “any, of such party be made a party to the action, or be
 “served with notice thereof in such manner and form as
 “hereinafter prescribed, and on such terms as the Court
 “or judge shall think just, and shall make such order for
 “the disposal of the action as may be just.” R. 2.
- Continuance by or against new parties. “In case of an assignment, creation, or devolution of
 “any estate or title *pendente lite*, the action may be con-
 “tinued by or against the person to or upon whom such
 “estate or title has come or devolved.” R. 3.
- Order for new parties. “Where by reason of marriage, death, or bankruptcy,
 “or any other event occurring after the commencement of
 “an action, and causing a change or transmission of in-
 “terest or liability, or by reason of any person interested
 “coming into existence after the commencement of the
 “action, it becomes necessary or desirable that any person
 “not already a party to the action should be made a party
 “thereto, or that any person already a party thereto should
 “be made a party thereto in another capacity, an order
 “that the proceedings in the action shall be carried on
 “between the continuing parties to the action, and such
 “new party or parties, may be obtained *ex parte* on appli-
 “cation to the Court or a judge, upon an allegation of
 “such change, or transmission of interest or liability, or
 “of such person interested having come into existence.”
 R. 4.
- Ex parte application to Court or judge.
- Service of orders. Effect. “An order so obtained shall, unless the Court or judge
 “shall otherwise direct, be served upon the continuing
 “party or parties to the action, or their solicitors, and
 “also upon each such new party, unless the person making
 “the application be himself the only new party, and the
 “order shall from the time of such service, subject never-
 “theless to the next two following rules, be binding on
 “the persons served therewith, and every person served
 “therewith who is not already a party to the action shall
 “be bound to enter an appearance thereto within the
 “same time and in the same manner as if he had been
 “served with a writ of summons.” R. 5.

“Where any person who is under no disability or under
 “no disability other than coverture, or being under any
 “disability other than coverture, but having a guardian
 “*ad litem* in the action, shall be served with such order,
 “such person may apply to the Court or a judge to dis-
 “charge or vary such order at any time within twelve
 “days from the service thereof.” R. 6.

Application
to discharge
or vary order.

“Where any person being under any disability other
 “than coverture, and not having had a guardian *ad litem*
 “appointed in the action, is served with any such order,
 “such person may apply to the Court or a judge to dis-
 “charge or vary such order at any time within twelve
 “days from the appointment of a guardian or guardians
 “*ad litem* for such party, and until such period of twelve
 “days shall have expired such order shall have no force or
 “effect as against such last-mentioned person.” R. 7.

Application
in case of
disability.

ORDER LI.

Transfers and Consolidations.

“Any action or actions may be transferred from one
 “Division to another of the High Court or from one
 “judge to another of the Chancery Division by an order
 “of the Lord Chancellor, provided that no transfer shall
 “be made from or to any Division without the consent of
 “the President of the Division.” R. 1.

Transfer by
order of Lord
Chancellor
subject to
consent of
President
of Division.

The following provisions on the transfer of actions from
 one Division to another are contained in the Judicature
 Acts, 1873 and 1875—

“Any cause or matter may at any time, and at any
 “stage thereof, and either with or without application
 “from any of the parties thereto, be transferred by such
 “authority and in such manner as Rules of Court may
 “direct, from one Division or judge of the High Court of
 “Justice to any other Division or judge thereof, or may
 “by the like authority be retained in the Division in

Power of
transfer.

“ which the same was commenced, although such may not
 “ be the proper Division to which the same cause or matter
 “ ought, in the first instance, to have been assigned.”
 Sect. 36, Jud. Act, 1873.

“ If any plaintiff or petitioner shall at any time assign
 “ his cause or matter to any Division of the said High
 “ Court to which, according to the Rules of Court or the
 “ provisions of the principal Act or this Act, the same
 “ ought not to be assigned, the Court, or any judge of
 “ such Division, upon being informed thereof, may, on a
 “ summary application at any stage of the cause or matter,
 “ direct the same to be transferred to the Division of the
 “ said Court to which, according to such rules or provisions,
 “ the same ought to have been assigned, or he may, if he
 “ think it expedient so to do, retain the same in the Divi-
 “ sion in which the same was commenced : and all steps
 “ and proceedings whatsoever taken by the plaintiff or
 “ petitioner or by any other party in any such cause or
 “ matter, and all orders made therein by the Court or any
 “ judge thereof before any such transfer, shall be valid and
 “ effectual to all intents and purposes in the same manner
 “ as if the same respectively had been taken and made in
 “ the proper Division of the said Court to which such cause
 “ or matter ought to have been assigned.” Sub-sect. 2 of
 sect. 11, Jud. Act, 1875.

Transfer by
 orders on con-
 sent of Pre-
 sident of
 Division.

“ Any action may, at any stage, be transferred from one
 “ Division to another by an order made by the Court or
 “ any judge of the Division to which the action is assigned :
 “ provided that no such transfer shall be made without the
 “ consent of the President of the Division to which the
 “ action is proposed to be transferred.” R. 2.

Assignment
 to a judge
 of Probate
 Division.

“ Any action transferred to the Chancery Division or
 “ the Probate Division, shall, by the order directing the
 “ transfer, be directed to be assigned to one of the judges
 “ of such Division to be named in the order.” R. 3.

Consolidation
 of actions.

“ Actions in any Division or Divisions may be consoli-
 “ dated by order of the Court or a judge in the manner

“heretofore in use in the Superior Courts of Common Law.” R. 4.

ORDER LIII.

Motions and other Applications.

“Where by these rules any application is authorized to be made to the Court or a judge in an action, such application, if made to a Divisional Court or to a judge in Court, shall be made by motion.” R. 1.

All applications in Court by motion.

“No rule or order to show cause shall be granted in any action, except in the cases in which an application for such rule or order is expressly authorized by these rules.” R. 2.

Rule nisi only granted in cases authorized by Rules.

“Except where by the practice existing at the time of the passing of the said Act any order or rule has heretofore been made *ex parte* absolute in the first instance, and except where by these rules it is otherwise provided, and except where the motion is for a rule to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order, *ex parte*, upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or judge may think just; and any party affected by such order may move to set it aside.” R. 3.

Motion after notice given.

Notice dispensed with.

“Unless the Court or judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion.” R. 4.

Length of notice.

“If, on the hearing of a motion or other application, the Court or judge shall be of opinion that any person to whom notice has not been given ought to have, or ought to have had, such notice, the Court or judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given,

Notice not served on all proper parties.

“upon such terms, if any, as the Court or judge may think
“fit to impose.” R. 5.

Adjournment. “The hearing of any motion or application may from
“time to time be adjourned upon such terms, if any, as
“the Court or judge shall think fit.” R. 6.

Service of
notice with-
out leave
before ap-
pearance. “The plaintiff shall, without any special leave, be at
“liberty to serve any notice of motion or other notice; or
“any petition or summons upon any defendant who, having
“been duly served with a writ of summons to appear in
“the action, has not appeared within the time limited for
“that purpose.” R. 7.

Service of
notice by
leave at time
of service of
writ or be-
fore appear-
ance entered. “The plaintiff may, by leave of the Court or a judge,
“to be obtained *ex parte*, serve any notice of motion upon
“any defendant along with the writ of summons, or at
“any time after service of the writ of summons, and be-
“fore the time limited for the appearance of such de-
“fendant.” R. 8.

ORDER LVI.

Notices and Paper, &c.

Notices. “All notices required by these rules shall be in writing,
“unless expressly authorized by a Court or judge to be
“given orally.” R. 1.

Printing
paper. “Proceedings required to be printed shall be printed on
“cream wove machine drawing foolscap folio paper, 19 lbs.
“per mill ream, or thereabouts, in pica type leaded, with
“an inner margin about three quarters of an inch wide,
“and an outer margin about two inches and a half wide.”
R. 2.

Affidavits. “Any affidavit may be sworn to either in print or in
“manuscript, or partly in print and partly in manuscript.”
R. 3.

ORDER LVII.

Time.

Months to
mean calendar
months. “Where by these rules, or by any judgment or order
“given or made after the commencement of the Act,

“time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months.” R. 1.

“Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time.” R. 2.

When Sunday, Christmas Day, and Good Friday, not to be reckoned.

“Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be opened.” R. 3.

Provision as to acts to be done while offices closed.

“No pleading shall be amended or delivered in the long vacation; unless directed by the Court or a judge.” R. 4.

No pleadings to be delivered or amended during long vacation.

“The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for filing, amending, or delivering any pleading, unless otherwise directed by a Court or a judge.” R. 5.

Long vacation not to be reckoned in time for pleadings.

“A Court or a judge shall have power to enlarge or abridge the time appointed by these rules or fixed by any order enlarging the time for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.” R. 6.

Power to abridge or enlarge time.

ORDER LVII. APRIL, 1880.

“The time for delivering or amending any pleading may be enlarged by consent in writing, without application to the Court or a judge.” R. 6a.

Enlargement of time by consent.
Order LVII.
R. 6a.

Service.
Order LVII.
R. 8.

“Service of pleadings, notices, summonses, orders, rules, and other proceedings shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any weekday except Saturday shall be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall be deemed to have been effected on the following Monday.” R. 8.

ORDER LIX.

Effect of Non-compliance and Amendment.

Proceedings
not void by
non-com-
pliance with
rules.

“Non-compliance with any of these rules shall not render the proceedings in any action void unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit.”

ORDER, APRIL, 1880.

Effect of Non-compliance and Amendment.

Amendment
Order LIX.
R. 2.

“The Court or a judge may at any time, and on such terms as to costs or otherwise as to the Court or judge may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for the purpose of determining the real question or issue raised by or depending on the proceedings.” R. 44.

ORDER LIV.

Applications at Chambers.

How made.

“Every application at chambers authorized by these rules shall be made in a summary way by summons.” R. 1.

“ In the Queen’s Bench, Common Pleas, and Exchequer Divisions a master, and in the Probate, Divorce, and Admiralty Division a registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act, or the schedule thereto, or these rules, may be transacted or exercised by a judge at chambers, except in respect of the following proceedings and matters; that is to say,—

What business the registrars may transact in chambers.

“ All matters relating to criminal proceedings or to the liberty of the subject :

“ The removal of actions from one division or judge to another division or judge :

“ The settlement of issues, except by consent :

“ Discovery, whether of documents or otherwise, and inspection, except by consent :

“ Appeals from district registrars :

“ Interpleader, other than such matters arising in interpleader as relate to practice only, except by consent :

“ Prohibitions :

“ Injunctions and other orders under sub-section 8 of section 25 of the Act, or under Order LII., Rules 1, 2, and 3 respectively :

“ Awarding of costs, other than the costs of any proceeding before such master :

“ Reviewing taxation of costs :

“ Charging orders on stock, funds, annuities, or share of dividends or annual produce thereof :

“ Acknowledgments of married women.” R. 2.

“ If any matter appears to the master proper for the decision of a judge the master may refer the same to a judge, and the judge may either dispose of the matter or refer the same back to the master with such directions as he may think fit.” R. 3.

Reference to judge.

“ Any person affected by any order or decision of a master may appeal therefrom to a judge at chambers. Such appeal shall be by summons, within four days after

Appeal from master to judge by summons.

“the decision complained of, or such further time as may
“be allowed by a judge or master.” R. 4.

Appeal no
stay.

“An appeal from a master’s decision shall be no stay of
“proceeding unless so ordered by a judge or master.”
R. 5.

FORMS RELATING TO MATTERS TRANSACTED AT CHAMBERS.

H. 2.

Order (General Form).

In the High Court of Justice. 18 . No. .
Probate, Divorce and Admiralty Division.
(Probate.)

* Insert name
of judge or
Registrar.

*Judge [*Registrar*] in Chambers.

Between A. B. . . . Plaintiff,
and

C. D. . . . Defendant.

Upon hearing . . . , and upon reading the affidavit of . . . filed the
day of 18 . , and

It is ordered . . . and that the costs of this application be . . .

Dated the . . . day of 18 . .

H. 8.

Order to Amend.

In the High Court of Justice. 18 . No. .
Probate, Divorce and Admiralty Division.
(Probate.)

Registrar in Chambers.

Between A. B. . . . Plaintiff,
and

C. D. . . . Defendant.

Upon hearing . . . and upon reading the affidavit of . . . filed the
day of 18 . , and

It is ordered that the plaintiff be at liberty to amend the writ of sum-
mons in this action by . . . and that the costs of this application be . . .

Dated the . . . day of 18 . .

E. 18.

Amended Summons.

In the High Court of Justice. 18 . No. .
Probate, Divorce and Admiralty Division.
(Probate.)

Between A. B. . . . Plaintiff,
and

C. D. . . . Defendant.

Amend in pursuance of order [*or fiat*] dated . . . the writ of summons
in this action by*

Dated the . . . day of 18 . .

(Signed)

(Address)

Solicitor for the

* Set out
amendments
when re-
quired.

E. 19.

Renewed Summons.

In the High Court of Justice. 18 . No. .
 Probate, Divorce and Admiralty Division.

(Probate.)

Between A. B. . . . Plaintiff,
 and
 C. D. . . . Defendant.

Seal in pursuance of order dated . , a renewed writ of summons in
 this action, indorsed as follows

Dated the . day of 18 .

(Signed)

(Address)

Solicitor for the

B. 24.

Affidavit of Service of Summons.

In the High Court of Justice. 18 . No. .
 Probate, Divorce and Admiralty Division.

(Probate.)

Between A. B. . . . Plaintiff,
 and
 C. D. . . . Defendant.

I . , of . , solicitor for the above-named . , make oath and
 say as follows :—

I did on the . day of 18 . , before the hour of . in the
 noon, serve the above-named . in this action with a
 true copy duly stamped of the summons hereto annexed marked A., by
 leaving it at the . of the said . situate with . there.

Sworn at this . }
 day of 18 . , }

Before me,

This affidavit is filed on behalf of the .

H. 55.

Order dismissing Summons (generally).

In the High Court of Justice. 18 . No. .
 Probate, Divorce and Admiralty Division.

(Probate.)

Registrar in Chambers.

Between A. B. . . . Plaintiff,
 and
 C. D. . . . Defendant.

Upon hearing . and upon reading the affidavit of . , filed the
 day of 18 . , and

It is ordered that the application of . be dismissed * with costs to
 be taxed and paid by the . to the .

Dated the . day of 18 .

* If the
 dismissal is
 with costs
 add these
 words.

H. 29.

Order for Arrest (Capias) under Debtors Act.

In the High Court of Justice. 18 . No. .
 Probate, Divorce and Admiralty Division.
 (Probate.)

Judge in Chambers.

Between A. B. . . . Plaintiff,
 and
 C. D. . . . Defendant.

Upon hearing . . . and upon reading the affidavit of . . . , filed the
 day of 18 , and

It is ordered that the defendant . . . be arrested and imprisoned for
 the term of . . . from the date of his arrest, including the day of such
 date, unless and until he shall sooner deposit in court the sum of £ . . . ,
 or give to the plaintiff a bond executed by him and two sufficient sureties
 in the penalty of £ . . . , or some other security satisfactory to the
 plaintiff, that . . .

H. 41.

Order for Examination touching Means.

In the High Court of Justice.
 Probate, Divorce and Admiralty Division.
 (Probate.)

Judge in Chambers.

Between A. B. . . . Judgment Creditor,
 and
 C. D. . . . Judgment Debtor.

Upon hearing . . . and upon reading the affidavit of . . . , filed the
 day of 18 , and

It is ordered that the above-named . . . do attend before the judge in
 chambers on the . . . day of . . . next, at . . . in the . . . noon, to
 be examined upon oath touching his means of paying the judgment debt,
 and that the costs of this application be . . .

Dated the . . . day of 18 .

H. 25.

Order Charging Stock—Nisi.

In the High Court of Justice. 18 . No. .
 Probate, Divorce and Admiralty Division.
 (Probate.)

Registrar in Chambers.

Between A. B. . . . Plaintiff,
 and
 C. D. . . . Defendant.

Upon hearing . . . , and upon reading the affidavit of . . . , filed the
 day of 18 , whereby it appears

It is ordered that unless sufficient cause be shown to the contrary before
 on . . . day the . . . day of 18 , at . . . o'clock in the
 forenoon, the defendant's interest in the . . . so standing as aforesaid
 shall, and that it in the meantime do stand charged with the payment of
 the above-mentioned amount due on the said judgment.

Dated the . . . day of 18 .

H. 26.

Order Charging Stock—Absolute.

In the High Court of Justice. 18 . No. .
 Probate, Divorce and Admiralty Division.
 (Probate.)

Judge in Chambers.

Between A. B. . . . Plaintiff,
 and

C. D. . . . Defendant.

Upon hearing , and upon reading the affidavit of , filed the
 day of , 18 , and an order nisi made herein on the
 day of , 18 , reciting the affidavit of , whereby it ap-
 peared

It is ordered that the defendant's interest in the so standing
 as aforesaid stand charged with the payment of the above-mentioned
 amount due on the said judgment.

Dated the day of 18 .

H. 27.

Charging Order—Solicitor's Costs.

In the High Court of Justice. No. .
 Probate, Divorce and Admiralty Division.
 (Probate.)

Judge in Chambers.

Between A. B. . . . Plaintiff,
 and

C. D. . . . Defendant.

Upon hearing , and upon reading the affidavit of , filed the
 day of , 18 , and

It is ordered that the said , the solicitor for the in this
 action shall have a charge upon for his costs, charges and expenses
 of and in reference to this action.

Dated the day of , 18 .

H. 40.

Order on Solicitor's Application to tax Bill of Costs.

In the High Court of Justice. 18 . No. .
 Probate, Divorce and Admiralty Division.
 (Probate.)

Registrar in Chambers.

In the matter of , gentleman, one of the solicitors of the Supreme
 Court.

Upon hearing , and upon reading the affidavit of , filed the
 day of , 18 , and

It is ordered that the above-named solicitor's bill of fees, charges and
 disbursements, delivered to (hereinafter called the said client) be
 referred to the registrar to be taxed, and that the said solicitor give credit
 for all sums of money by him received from or on account of the said
 client, and that he refund what, if anything, he may on such taxation
 appear to have been overpaid.

And it is further ordered that the registrar tax the costs of the reference and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be paid according to the event of the taxation, pursuant to the statute.

H. 39.

Order on Client's Application to tax Solicitor's Bill of Costs.

In the High Court of Justice. 18 . No. .

Probate, Divorce and Admiralty Division.

(Probate.)

Registrar in Chambers.

In the matter of , gentleman, one of the solicitors of the Supreme Court.

Upon the application of (hereinafter called "the applicant"),

It is ordered that the bill of fees, charges and disbursements delivered to the applicant by the above-named solicitor be referred to the registrar to be taxed, and that the said solicitor give credit for all sums of money by him received of or on account of the applicant, and that he refund what, if anything, he may on such taxation appear to have been overpaid.

And it is further ordered that if the said solicitor attends on the taxation, the registrar tax the costs of the reference, and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be charged (if payable) according to the event of the taxation, pursuant to the statute.

And it is further ordered that the said solicitor do not commence or prosecute any action or suit touching the demand pending the reference.

And it is further ordered that upon payment by the applicant of what (if anything) may appear to be due to the said solicitor, the said solicitor do (if required) deliver up to the applicant, or as he may direct, all deeds, books, papers and writings in the said solicitor's possession, custody or power, belonging to the applicant.

And it is ordered that the costs of this application be .

Dated the day of , 18 .

H. 12.

Order to Discharge or Vary on Application by Third Party.

In the High Court of Justice. 18 . No. .

Probate, Divorce and Admiralty Division.

(Probate.)

Registrar in Chambers.

Between A. B. . . . Plaintiff,

and

C. D. . . . Defendant.

Upon hearing and upon reading the affidavit of filed the day of 18 , and

It is ordered that the order of in this action dated the day of 18 be discharged [or varied by], and that the costs of this application be .

Dated the day of 18 .

H. 13.

Order to Dismiss for want of Prosecution.

In the High Court of Justice. 18 . No. .

Probate, Divorce and Admiralty Division.

(Probate.)

Registrar in Chambers.

Between A. B. . . . Plaintiff,

and

C. D. . . . Defendant.

Upon hearing , and upon reading the affidavit of , filed
the day of 18 , and

It is ordered that this action be, for want of prosecution, dismissed
with costs, to be taxed and paid to the defendant by the plaintiff, and
that the costs of this application be .

Dated the day of 18 .

H. 42.

Order to try Action in County Court.

In the High Court of Justice. 18 . No. .

Probate, Divorce and Admiralty Division.

(Probate.)

Registrar in Chambers.

Between A. B. . . . Plaintiff,

and

C. D. . . . Defendant.

Upon hearing , and upon reading the affidavit of , filed
the day of 18 , and

It is ordered that this action be tried before the county court of
holden at , and that the costs of this application be

Dated the day of 18 .

H. 37.

Garnishee Order (attaching Debt).

In the High Court of Justice. 18 . No. .

Probate, Divorce and Admiralty Division.

(Probate.)

Registrar in Chambers.

Between A. B. . . . Judgment Creditor,

and

C. D. . . . Judgment Debtor,

Garnishee.

Upon hearing , and upon reading the affidavit of , filed
the day of 18 , and

It is ordered that all debts owing or accruing due from the above-
named garnishee to the above-named judgment debtor be attached to
answer a judgment recovered against the said judgment debtor by the

above-named judgment creditor in the High Court of Justice on the
day of 18 , for the sum of £ , on which judgment the
said sum of £ remains due and unpaid.

And it is further ordered that the said garnishee attend the registrar in
chambers on day, the day of 18 , at o'clock in
the noon, on an application by the said judgment creditor, that the
said garnishee pay the debt due from him to the said judgment debtor,
or so much thereof as may be sufficient to satisfy the judgment.

And that the costs of this application be .

Dated the day of 18 .

H. 38.

Garnishee Order (Absolute).

In the High Court of Justice. 18 . No. .

Probate, Divorce and Admiralty Division.

(Probate.)

Registrar in Chambers.

Between A. B. . . . Judgment Creditor,
and

C. D. . . . Judgment Debtor,
Garnishee.

Upon hearing , and upon reading the affidavit of , filed
the day of 18 , and , whereby it was ordered that all
debts owing or accruing due from the above-named garnishee to the
above-named judgment debtor should be attached to answer a judg-
ment recovered against the said judgment debtor by the above-named
judgment creditor in the High Court of Justice on the day of
18 , for the sum of £ , on which judgment the said sum of
£ remained due and unpaid,

It is ordered that the said garnishee do forthwith pay the said judg-
ment creditor the debt due from him to the said judgment debtor (or so
much thereof as may be sufficient to satisfy the judgment debt), and that
in default thereof execution may issue for the same, and that the costs
of this application be .

Dated the day of 18 .

H. 39.

Order on Client's Application to tax Solicitor's Bill of Costs.

In the High Court of Justice. 18 . No. .

Probate, Divorce and Admiralty Division.

(Probate.)

Registrar in Chambers.

In the matter of , gentleman, one of the solicitors of the Supreme
Court.

Upon the application of (hereinafter called "the applicant").

It is ordered that the bill of fees, charges and disbursements delivered
to the applicant by the above-named solicitor be referred to the master to

be taxed, and that the said solicitor give credit for all sums of money by him received of or on account of the applicant, and that he refund what, if anything, he may on such taxation appear to have been overpaid.

And it is further ordered that if the said solicitor attends on the taxation, the master tax the costs of the reference, and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference, to be charged (if payable) according to the event of the taxation, pursuant to the statute.

And it is further ordered that the said solicitor do not commence or prosecute any action or suit touching the demand pending the reference.

And it is further ordered that upon payment by the applicant of what (if anything) may appear to be due to the said solicitor the said solicitor do (if required) deliver up to the applicant, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the applicant.

And it is ordered that the costs of this application be .

Dated the day of 18 .

E. 15.

Habeas Corpus ad Testificandum.

In the High Court of Justice. 18 . No. .

Probate, Divorce and Admiralty Division.

(Probate.)

Between A. B. Plaintiff,

and

C. D. Defendant.

Seal in pursuance of order dated a writ of *habeas corpus ad testifi-*
candum directed to the to bring before .

Dated the day of 18 .

(Signed)

(Address)

Solicitor for the .

H. 46.

Order for Committal of Judgment Debtor.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate.)

Judge in Chambers.

Between A. B. Judgment Creditor,

and

C. D. Judgment Debtor.

Upon hearing , and upon reading the affidavit of , filed the
day of 18 , and

It is ordered that the above-named judgment debtor be, for default in payment of the debt hereinafter mentioned, committed to prison for the term of from the date of his arrest, including the day of such date, or until he shall pay £ , being the amount due from him in

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pursuance of a judgment [*or order*] of the High Court of Justice, bearing date the day of 18 , together with interest thereon at 4*l.* per centum per annum from the aforesaid date, and 1*l.* 6*s.* 8*d.* for costs of this order, and sheriff's fees for the execution thereof.

And it is further ordered that the sheriff take the said debtor for the purpose aforesaid if he is found within his bailiwick.

And it is ordered that the costs of this application be .

Dated the day of 18 .

H. 47.

Order for Committal of Judgment Debtor on Non-payment of Instalment.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate.)

Judge in Chambers.

Between A. B. Judgment Creditor,
and

C. D. Judgment Debtor.

Upon hearing , and upon reading the affidavit of , filed the day of 18 , and

It is ordered that the above-named judgment debtor be, for default in payment of £ , being the amount of the [*first*] instalment of the judgment debt of £ in this action directed to be paid pursuant to the order of , bearing date the day of 18 , committed to prison for the term of from the date of his arrest, including the day of such date, or until he shall pay the said instalment together with 13*s.* 4*d.* the costs of this order, and sheriff's fees for the execution thereof.

And it is further ordered that the sheriff of take the said debtor for the purpose aforesaid if he is found in his bailiwick.

And it is ordered that the costs of this application be .

Dated the day of 18 .

H. 45.

Order for Payment of Judgment Debt by Instalments.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate.)

Judge in Chambers.

Between A. B. Judgment Creditor,
and

C. D. Judgment Debtor.

Upon hearing , and upon reading the affidavit of , filed the day of 18 , and

It is ordered that the above-named judgment debtor do pay to the above-named judgment creditor the sum of £ , together with interest thereon at the rate of 4*l.* per centum per annum from the day of 18 , the date of the judgment, and also £ the costs of this application in manner following; namely, [*here describe the mode in which the payment is to be made*].

Dated the day of 18 .

H. 36.

Order for Examination of Judgment Debtor:

In the High Court of Justice. 18 . No. .
 Probate, Divorce and Admiralty Division.
 (Probate.)

Registrar in Chambers.

Between A. B. . . . Judgment Creditor,
 and
 C. D. . . . Judgment Debtor.

Upon hearing , and upon reading the affidavit of , filed the
 day of 18 , and

It is ordered that the above-named judgment debtor attend and be orally examined as to whether any and what debts are owing to him, before the registrar in chambers, at such time and place as he may appoint, and that the said judgment debtor produce his [books*] before the said registrar at the time of the examination, and that the costs of this application be . * Or as may be ordered.

Dated the day of 18 .

H. 10.

Order for Particulars (General).

In the High Court of Justice. 18 . No. .
 Probate, Divorce and Admiralty Division.
 (Probate.)

Registrar in Chambers.

Between A. B. . . . Plaintiff,
 and
 C. D. . . . Defendant.

Upon hearing , and upon reading the affidavit of , filed the
 day of 18 , and

It is ordered that the plaintiff deliver to the defendant an account in writing of the particulars of the plaintiff's claim in this action, and that unless such particulars be delivered within days from the date of this order all further proceedings be stayed until the delivery thereof, and that the costs of this application be .

Dated the day of 18 .

H. 3.

Order for Time.

In the High Court of Justice. 18 . No. .
 Probate, Divorce and Admiralty Division.
 (Probate.)

Registrar in Chambers.

Between A. B. . . . Plaintiff,
 and
 C. D. . . . Defendant.

Upon hearing , and upon reading the affidavit of , filed the
 day of 18 , and

It is ordered that the shall have time and that the costs of this application be .

Dated the day of 18 .

ADDITIONAL RULES AS TO COSTS, AUG. 1875.

ORDER I.

Printing depositions.	“Where any written deposition of a witness has been filed for use on a trial, such deposition shall be printed, unless otherwise ordered.”
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ORDER II.

When rules as to printing not to apply.	“The rules of Court as to printing depositions and affidavits to be used on a trial shall not apply to depositions and affidavits which have previously been used upon any proceeding without having been printed.”
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ORDER III.

Printing of affidavits by consent or order.	“Other affidavits than those required to be printed by Order XXXVIII., Rule 6, in the schedule to the Supreme Court of Judicature Act, 1875, may be printed if all the parties interested consent thereto, or the Court or judge so order.”
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ORDER IV.

Printing special case.	“The 3rd Rule of the Order XXXIV. in the first schedule to the Supreme Court of Judicature Act, 1875, shall apply to a special case, pursuant to the Act of 13 & 14 Vict. c. 35.”
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ORDER V.

Regulations as to printing.	“Where, pursuant to rules of Court, any pleading, special case, petition of right, deposition, or affidavit is to be printed, and where any printed or other office copy thereof is to be taken, the following regulations shall be observed :
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Who to print.	“1. The party on whose behalf the deposition or affidavit is taken and filed is to print the same in the manner provided by Rule 2 of Order LVI. in the first schedule to the Supreme Court of Judicature Act, 1875.
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“ 2. To enable the party printing, to print any depo-
 sition, the officer with whom it is filed shall on demand
 deliver to such party a copy written on draft paper on
 one side only. Depositions.

“ 3. The party printing shall, on demand in writing,
 furnish to any other party or his solicitor any number
 of printed copies, not exceeding ten, upon payment
 therefor at the rate of 1*d.* per folio for one copy, and
 $\frac{1}{2}$ *d.* per folio for every other copy. Furnishing
printed copies,
and costs
of same.

“ 4. The solicitor of the party printing shall give
 credit for the whole amount payable by any other
 party for printed copies. Credit.

“ 5. The party entitled to be furnished with a print
 shall not be allowed any charge in respect of a written
 copy, unless the Court or judge shall otherwise direct. Furnishing
written
copies.

“ 6. The party by or on whose behalf any deposition,
 affidavit, or certificate is filed shall leave a copy with
 the officer with whom the same is filed, who shall
 examine it with the original and mark it as an office
 copy; such copy shall be a copy printed as above
 provided where such deposition or affidavit is to be
 printed. Office copies.

“ 7. The party or solicitor who has taken any printed
 or written office copy of any deposition or affidavit is
 to produce the same upon every proceeding to which
 the same relates. Production of
same.

“ 8. Where any party is entitled to a copy of any
 deposition, affidavit, proceeding, or document filed or
 prepared by or on behalf of another party, which is
 not required to be printed, such copy shall be fur-
 nished by the party by or on whose behalf the same
 has been filed or prepared. Furnishing
copies where
not printed.

“ 9. The party requiring any such copy, or his soli-
 citor, is to make a written application to the party by
 whom the copy is to be furnished, or his solicitor, with
 an undertaking to pay the proper charges, and there-
 upon such copy is to be made and ready to be delivered Applications
for copies.

In ex parte
applications.

“ at the expiration of twenty-four hours after the receipt
“ of such request and undertaking, or within such other
“ time as the Court or judge may in any case direct,
“ and is to be furnished accordingly upon demand and
“ payment of the proper charges.

“ 10. In the case of an *ex parte* application for an
“ injunction or writ of *ne exeat regno*, the party making
“ such application is to furnish copies of the affidavits
“ upon which it is granted upon payment of the proper
“ charges immediately upon the receipt of such written
“ request and undertaking as aforesaid, or within such
“ time as may be specified in such request, or may have
“ been directed by the Court.

Foot note of
party filing
affidavit.

“ 11. It shall be stated in a note at the foot of every
“ affidavit filed on whose behalf it is so filed, and such
“ note shall be printed on every printed copy of an
“ affidavit or set of affidavits, and copied on every office
“ copy and copy furnished to a party.

Name and
address to be
endorsed on
copy fur-
nished.

“ 12. The name and address of the party or solicitor
“ by whom any copy is furnished is to be indorsed
“ thereon in like manner as upon proceedings in Court,
“ and such party or solicitor is to be answerable for the
“ same being a true copy of the original, or of an office
“ copy of the original, of which it purports to be a copy,
“ as the case may be.

Folios to be
marked.

“ 13. The folios of all printed and written office
“ copies, and copies delivered or furnished to a party,
“ shall be numbered consecutively in the margin thereof,
“ and such written copies shall be written in a neat and
“ legible manner on the same paper as in the case of
“ printed copies.

When party
refuses or
neglects to
furnish copy.

“ 14. In case any party or solicitor who shall be re-
“ quired to furnish any such written copy as aforesaid
“ shall either refuse or, for twenty-four hours from the
“ time when the application for such copy has been
“ made, neglect to furnish the same, the person by whom
“ such application shall be made shall be at liberty to

“procure an office copy from the office in which the
 “original shall have been filed, and in such case no
 “costs shall be due or payable to the solicitor so making
 “default in respect of the copy or copies so applied for.

“15. Where, by any order of the Court (whether of
 “appeal or otherwise) or a judge, any pleading, evidence,
 “or other document is ordered to be printed, the Court
 “or judge may order the expense of printing to be
 “borne and allowed, and printed copies to be furnished
 “by and to such parties and upon such terms as shall
 “be thought fit.”

Costs of
 printing
 when ordered
 by Court or
 judge.

ORDER VI.

“The following regulations as to costs of proceedings
 “in the Supreme Court of Judicature shall regulate such
 “costs from the commencement of the Supreme Court of
 “Judicature Acts, 1873 and 1875 :

“1. Solicitors shall be entitled to charge and be allowed
 “the fees set forth in the column headed ‘lower scale’ in
 “the schedule hereto—

Solicitors’
 charges.

“In all actions for purposes to which any of the forms
 “of indorsement of claim on writs of summons in Sections
 “II., IV., and VII. in Part II. of Appendix A., referred
 “to in the 3rd rule of Order III. in the schedule to the
 “Supreme Court of Judicature Act, 1875, or other similar
 “forms, are applicable (except as after provided in actions
 “for injunctions) ;

“In all causes and matters by the 34th section of the
 “said Act assigned to the Probate, Divorce, and Admiralty
 “Division of the Court.

“2. Solicitors shall be entitled to charge and be allowed
 “the fees set forth in the column headed ‘higher scale’ in
 “the schedule hereto ; in all actions for special injunctions
 “to restrain the commission or continuance of waste,
 “nuisances, breaches of covenant, injuries to property, and
 “infringement of rights, easements, patents and copy-
 “rights, and other similar cases where the procuring such

Costs on
 higher scale.

- Discretion of Court or judge as to scale allowed. “injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed ‘lower scale’ are hereby made applicable.
- “3. Notwithstanding these rules, the Court or judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs.”
- Interpretation of terms. “The provisions of Order LXIII. in the first schedule to the Supreme Court of Judicature Act, 1875, shall apply to these rules.”

The SCHEDULE above referred to.

An Order or Rule herein referred to by number shall mean the Order or Rule so numbered in the First Schedule to the Supreme Court of Judicature Act, 1875.

WRITS, SUMMONSES, AND WARRANTS.

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Writ of summons for the commencement of any action	0	6	8	0	13	4
And for indorsement of claim, if special	0	5	0	0	5	0
Concurrent writ of summons	0	6	8	0	6	8
Renewal of a writ of summons	0	6	8	0	6	8
Notice of a writ for service in lieu of writ out of jurisdiction	0	4	0	0	5	0
Writ of inquiry	1	1	0	1	1	0
Writ of mandamus or injunction	0	10	0	1	1	0
Or per folio	0	1	4	0	1	4
Writ of subpoena ad testificandum duces tecum ..	0	6	8	0	6	8
And if more than four folios, for each folio beyond four	0	1	4	0	1	4
Writ or writs of subpoena ad testificandum for any number of persons not exceeding three, and the same for every additional number not exceeding three	0	6	8	0	6	8
Writ of distringas, pursuant to statute 5 Viet. c. 8	0	13	4	0	13	4
Writ of execution, or other writ to enforce any judgment or order	0	7	0	0	10	0
And if more than four folios, for each folio beyond four	0	1	4	0	1	4
Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal	0	6	8	0	6	8
Notice thereof to serve on sheriff	0	4	0	0	5	0

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Any writ not included in the above.....	0	7	0	0	10	0
These fees include all indorsements and copies, or præcipes, for the officer sealing them, and attendances to issue or seal, but not the Court fees.						
Summons to attend at Judges' Chambers	0	3	0	0	6	8
Or if special, at taxing officer's discretion, not exceeding	0	6	8	1	1	0
Copy for the judge, when required	0	2	0	0	2	0
Or per folio	—			0	0	4
Original summons for proceedings in chambers in the Chancery Division	0	13	4	1	1	0
And attending to get same and duplicate sealed, and at the proper office to file duplicate and get copies for service stamped	0	13	4	0	13	4
Copy for the judge	0	2	0	0	2	0
Or per folio	—			0	0	4
Indorsing same and copies under 8th rule of the 35th of the Consolidated General Orders of the Court of Chancery	0	6	8	0	6	8

SERVICES, NOTICES, AND DEMANDS.

Service of any writ, summons, warrant, interrogatories, petition, order, notice, or demand on a party who has not entered an appearance, and if not authorized to be served by post.....	0	5	0	0	5	0
If served at a distance of more than two miles from the nearest place of business, or office of the solicitor serving the same, for each mile beyond such two miles therefrom	0	1	0	0	1	0
Where, in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition	0	7	0	0	7	0
Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.						
For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.						
Service where an appearance has been entered on the solicitor or party	0	2	6	0	2	6
Or if authorized to be served by post	0	1	6	0	1	6
Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.						

Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together.

In proceedings to wind up a company, the usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing, and amount to more than 3*l*.

Where any appointment is or ought to be adjourned, service of a notice of the adjournment, or next appointment, is not to be allowed.

APPEARANCES.

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Entering any appearance	0	6	8	0	6	8
If entered at one time, for more than one person, for every defendant beyond the first	0	1	0	0	2	0
If a person appearing to a writ of summons to recover land limits his defence by his memorandum of appearance, in addition to the above	0	6	8	0	6	8

INSTRUCTIONS.

To sue or defend	0	6	8	0	13	4
For statement of complaint	0	13	4	2	2	0
For statement or further statement of defence	0	6	8	0	13	4
For counter-claim	0	6	8	0	13	4
For reply by plaintiff when defendant sets up a counter-claim	0	13	4	1	1	0
For reply or further reply in any other case by plaintiff or other person, with or without joinder of issue	0	6	8	0	13	4
For confession of defence	0	6	8	0	13	4
For joinder of issue without other matter and for demurrer	0	6	8	0	13	4
For special case, special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness	0	6	8	0	13	4
To amend any pleading	0	6	8	0	13	4
For affidavit in answer to interrogatories, and other special affidavits	0	6	8	0	6	8
To appeal	0	13	4	1	1	0
To add parties by order of Court or judge	0	6	8	0	13	4
For counsel to advise on evidence when the evidence in chief is to be taken orally	0	6	8	0	6	8
Or not to exceed	0	13	4	1	1	0
For counsel to make any application to a Court or judge where no other brief	0	6	8	0	10	0
For brief on motion for special injunction	0	13	4	1	1	0

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
For brief on hearing or trial of action upon notice of trial given, whether such trial be before a judge, with or without a jury, or before an official or special referee, or on trial of an issue of fact, before a judge, commissioner or referee, or on assessment of damages.....	1	1	0	2	2	0
For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence.						
The fees for instructions for brief are not to apply to a hearing on further consideration.						

DRAWING PLEADINGS AND OTHER DOCUMENTS.

Statement of claim	0	10	0	1	1	0
Or per folio	0	1	0	0	1	0
Statement of defence	0	5	0	0	10	0
Or per folio	0	1	0	0	1	0
Statement of defence and counter-claim.....	0	5	0	1	1	0
Or per folio	0	1	0	0	1	0
Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, demurrer, and any other pleading (not being a petition or summons) and amendments of any pleading	0	5	0	0	10	0
Or per folio	0	1	0	0	1	0
Particulars, breaches and objections, when required, and one copy to deliver	0	5	0	0	6	8
Or such amount as the taxing officer shall think fit, not exceeding per folio	0	0	8	0	1	4
If more than one copy to be delivered, for each other copy per folio.....	0	0	4	0	0	4
Special case, whether original or in an action, affidavits in answer to interrogatories and other special affidavits, special petitions and interrogatories, per folio	0	1	0	0	1	0
Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, demurrer, special case and petition before a Court or judge, sheriff, commissioner, referee, examiner or officer of the Court, when necessary and proper in addition to pleadings, including necessary and proper observations, per folio	0	1	0	0	1	0

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Brief on application to add parties	0	6	8	0	10	0
Or per folio	0	1	0	0	1	0
Brief on further consideration, per sheet of ten folios	0	6	8	0	6	8
Accounts, statements, and other documents for the Judges' Chambers, when required, and fair copy to leave, per folio	0	0	8	0	1	4
Advertisements to be signed by judges' clerk, including attendance therefor	0	6	8	0	13	4
Bill of costs for taxation, including copy for the taxing officer	0	0	8	0	0	8

COPIES.

Of pleadings, briefs, and other documents where no other provision is made, at per folio	0	0	4	0	0	4
Where, pursuant to rules of Court any pleading, special case or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the court), at per folio	0	0	4	0	0	4
And for examining the proof print, at per folio ..	0	0	2	0	0	2
And for printing the amount actually and properly paid to the printer, not exceeding per folio	0	1	0	0	1	0
And in addition for every 20 beyond the first 20 copies, at per folio	0	0	1	0	0	1
And where any part shall properly be printed in a foreign language, or as a fac-simile, or in any unusual or special manner, or where any alteration in the document being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable.						
These allowances are to include all attendances on the printer.						
The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor.						
In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following but for no other purposes (videlicet):						
Of any pleading for delivery to the opposite party, or filing in default of appearance						

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Of any special case for filing						
Of any petition of right for presentation, if presented in print, and for the solicitor of the Treasury, and service on any party						
Of any pleading, special case, or petition of right, for the use of the Court or judge						
Of any affidavit to be sworn to in print						
And of any pleading, special case, petition of right, or evidence for the use of counsel in Court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor, at per folio	0	0	2	0	0	3
Such additional allowances for printed copies for the Court or judge, and for counsel, are not to be made where written copies have been made previously to printing, and are not in any case to be made more than once in the progress of the cause.						
Close copies, whether printed or written, are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing officer.						
Inserting amendments in a printed copy of any pleading, special case, or petition of right, when not reprinted	0	1	0	0	5	0
Or per folio	0	0	4	0	0	4

PERUSALS.

Of statement of complaint, statement of defence, reply, joinder of issue, demurrer, and other pleading (not being a petition or summons) by the solicitor of the party to whom the same are delivered	0	6	8	0	13	4
Or per folio	—			0	0	4
Of amendment of any such pleading in writing ..	0	6	8	0	6	8
Or per folio	—			0	0	4
If same reprinted	0	6	8	0	13	4
Or per folio of amendment	—			0	0	4
Of interrogatories to be answered by a party by his solicitor	0	6	8	0	13	4
Or per folio	—			0	0	4
Of special case by the solicitor of any party except the one by whom it is prepared	0	6	8	0	13	4
Or per folio	—			0	0	4

	Lower Scale.		Higher Scale.	
	£	s. d.	£	s. d.
Of copy order to add parties, notice of defendant's claim against any person not a party to the action under Order XVI., Rule 18, and of defendant's statement of defence and counter claim served on a person not a party under Order XXII., Rule 6, by the solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of complaint is also to be allowed unless the solicitor has been previously allowed such perusal	0	6 8	0	13 4
Or per folio	—		0	0 4
Of notice to produce and notice to admit by the solicitor of the party served	0	6 8	0	13 4
Of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of other special affidavits by the solicitor of the party against whom the same can be read, per folio ..	0	0 4	0	0 4

ATTENDANCES.

To obtain consent of next friend to sue in his name	0	6 8	0	13 4
To deliver or file any pleading (not being a petition or summons) and a special case	0	3 4	0	6 8
To inspect, or produce for inspection, documents pursuant to a notice to admit	0	6 8	0	13 4
Or per hour	0	6 8	0	6 8
To examine and sign admissions	0	6 8	0	13 4
To inspect, or produce for inspection, documents referred to in any pleading or affidavit, pursuant to notice under Order XXXI. Rule 14 ..	0	6 8	0	6 8
Or per hour	0	6 8	0	6 8
To obtain or give any necessary or proper consent	0	6 8	0	6 8
To obtain an appointment to examine witnesses ..	0	6 8	0	6 8
On examination of witnesses before any examiner, commissioner, officer, or other person	0	13 4	0	13 4
Or according to circumstances, not to exceed	2	2 0	2	2 0
Or if without counsel, not to exceed	—		3	3 0
On deponents being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit.....	0	6 8	0	6 8
On a summons at Judges' Chambers	0	6 8	0	6 8
Or according to circumstances not to exceed.....	1	1 0	1	1 0

In the Chancery Division, all allowances for attending at the Judges' Chambers are to be by the judge or chief clerk as heretofore.

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
To file chief clerks' and taxing masters' certificates, and get copy marked as an office copy	0	6	8	0	6	8
On counsel with brief or other papers—						
If counsel's fee one guinea	0	3	4	0	6	8
If more and under five guineas	0	6	8	0	6	8
If five guineas and under twenty guineas	0	6	8	0	13	4
If twenty guineas	0	13	4	1	1	0
If forty guineas or more	—			2	2	0
On consultation or conference with counsel	0	13	4	0	13	4
To enter or set down action, demurrer, special case, or appeal, for hearing or trial	0	6	8	0	6	8
In Court on motion of course and on counsel and for order	0	10	0	0	13	4
To present petition for order of course and for order	0	6	8	0	13	4
In Court on every special motion, each day	0	6	8	0	13	4
On same when heard each day	0	13	4	0	13	4
Or according to circumstances	1	1	0	2	2	0
On demurrer, special case, or special petition, or application adjourned from the Judges' Chambers, when in the special paper for the day, or likely to be heard	0	6	8	0	10	0
On same when heard	0	13	4	1	1	0
Or according to circumstances, not to exceed	1	1	0	2	2	0
On hearing or trial of any cause, or matter, or issue of fact, in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a judge with or without a jury, or commissioner, or referee, or on assessment of damages, when in the paper	0	10	0	0	10	0
When heard or tried	0	13	4	1	1	0
Or according to circumstances	2	2	0	2	2	0
When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent	2	2	0	3	3	0
And expenses (besides actual reasonable travelling expenses) each day, including Sundays	1	1	0	1	1	0
Or if the solicitor has to attend on more than one trial or assessment at the same time and place, in each case	1	1	0	1	11	6
The expenses in such case to be rateably divided.						
To hear judgment when same adjourned	0	6	8	0	13	4
Or according to circumstances	0	13	4	1	1	0
To deliver papers (when required) for the use of a judge prior to a hearing	0	6	8	0	6	8

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
If more than one judge	0	13	4	0	13	4
On taxation of a bill of costs	0	6	8	0	6	8
Or according to circumstances, not to exceed	2	2	0	2	2	0
In causes for purposes within the cognizance of the Court of Chancery before the Act passed, such further fee as the taxing officer may think fit, not exceeding the allowances heretofore made.						
To obtain or give an undertaking to appear	0	6	8	0	6	8
To present a special petition, and for same answered	0	6	8	0	6	8
On printer to insert advertisement in Gazette	0	6	8	0	6	8
On printer to insert same in other papers, each printer	—			0	6	8
Or every two	0	6	8	—		
On registrar to certify that a cause set down is settled, or for any reason not to come into the paper for hearing	0	6	8	0	6	8
For an order drawn up by chief clerk, and to get same entered	0	6	8	0	6	8
On counsel to procure certificate that cause proper to be heard as a short cause, and on registrar to mark same	0	6	8	0	6	8
To mark conveyancing counsel or taxing master ..	0	6	8	0	6	8
For preparing and drawing up an order made at chambers in proceedings to wind up a company and attending for same, and to get same entered	0	13	4	0	13	4
And for engrossing every such order, per folio	0	0	4	0	0	4

NOTE.—An order of course means an order made on an *ex parte* application, and to which a party is entitled as of right on his own statement and at his own risk.

OATHS AND EXHIBITS.

Commissioners to take oaths or affidavits. For every oath, declaration, affirmation, or attestation upon honour in London or the country	0	1	6	0	1	6
The solicitor for preparing each exhibit in town or country	0	1	0	0	1	0
The commissioner for marking each exhibit	0	1	0	0	1	0

TERM FEES.

For every term commencing on the day the sittings in London and Middlesex of the High Court of Justice commence, and terminating on the day preceding the next such sittings, in which a proceeding in the cause or matter by or affecting the party, other than the issuing and serving the writ of summons, shall take place ..	0	15	0	0	15	0
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T.

Z

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
And further, in country agency causes or matters, for letters	0	6	0	0	6	0
Where no proceeding in the cause or matter is taken which carries a term fee, a charge for letters may be allowed, if the circumstances re- quire it.						
In addition to the above an allowance is to be made for the necessary expense of postages, carriage and transmission of documents.						

SPECIAL ALLOWANCES AND GENERAL PROVISIONS.

1. As to writs of summons requiring special indorsement, original special cases, pleadings, and affidavits in answer to interrogatories, and other special affidavits, when the higher scale is applicable, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper.

2. As to drawing any pleading or other document, the fees allowed shall include any copy made for the use of the solicitor, agent, or client, or for counsel to settle.

3. As to instructions to sue or defend, when the higher scale is applicable, if in consequence of the instructions being taken separately from more than three persons (not being co-partners) the taxing officer shall consider the fee above provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable.

4. As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit.

5. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponent to settle and read over.

6. As to delivery of pleadings, services, and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service.

7. As to perusals the fees are not to apply where the same solicitor is for both parties.

8. As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed.

9. As to agency correspondence, in country agency causes and matters, if it be shown to the satisfaction of the taxing officer that such corres-

pondence has been special and extensive, he is to be at liberty to make such special allowance in respect thereof as in his discretion he may think proper.

10. As to attendances at the Judges' Chambers, where, from the length of the attendance, or from the difficulty of the case, the judge or master shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the judge or master in chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the judge or master may allow such fee in lieu of the fee of 1*l.* 1*s.* above provided, not exceeding 2*l.* 2*s.*, or where the higher scale is applicable 3*l.* 3*s.*, or in proceedings to wind up a company 5*l.* 5*s.*, as in his discretion he may think fit; and where the preparation of the case or matter to lay it before a judge at chambers on a summons shall have required and received from the solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the judge to deserve higher remuneration than the ordinary fees, the judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose and signed by the judge, specifying distinctly the grounds of such allowance, such fee, not exceeding 10 guineas, as in his decision he may think fit, instead of the above fees of 2*l.* 2*s.*, 3*l.* 3*s.*, and 5*l.* 5*s.*

11. As to attendances at the Judges' Chambers, where by reason of the non-attendance of any party (and it is not considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested.

12. A folio is to comprise 72 words, every figure comprised in a column being counted as one word.

13. Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by counsel, are to be allowed; but as to affidavits a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time.

14. As to counsel attending at Judges' Chambers, no costs thereof shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend.

15. As to inspection of documents under Order XXXI., Rule 14, no allowance is to be made for any notice or inspection, unless it is shown

to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection.

16. As to taking copies of documents in possession of another party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require at the rate of 4*d.* per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof.

17. Where a petition in any cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be 2*l.* 2*s.* The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or judge shall consider the party entitled, notwithstanding such notice or tender, to appear in court. In any other case in which a solicitor of a party served necessarily or properly peruses any such petition without appearing thereon he is to be allowed a fee not exceeding 2*l.* 2*s.*

18. The Court or judge may, at the hearing of any cause or matter, or upon any application or procedure in any cause or matter in court or at chambers, and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length; and in such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter or length; and in any case where such question shall not have been raised before and dealt with by the Court or judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so.

19. In any case in which, under the preceding Rule No. 18, or any other rule of Court, or by the order or direction of a Court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjudge the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such

officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

20. Where in the Chancery Division any question as to any costs is under the preceding Rule 18 dealt with at chambers, the chief clerk is to make a note thereof, and state the same on his allowance of the fees for attendances at chambers, or otherwise, as may be convenient for the information of the taxing officer.

21. Where any party appears upon any application or proceeding in Court or at chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance, unless the Court or judge shall expressly direct such costs to be allowed.

22a [April, 1880]. The costs of an application to extend the time for taking any proceeding shall, in the absence of an order by the Court or a judge directing by whom they are to be paid, be in the discretion of the taxing master.

23. The taxing officers of the Supreme Court, or of any Division thereof, shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been performed by any of the masters, taxing masters, registrars, or other officers of any of the Courts whose jurisdiction is by the Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities as previous to the commencement of the Act were vested in any of such officers, including examining witnesses, directing production of books, papers and documents, making separate certificates or allocators, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a judge.

24. The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance such officer shall in his discretion consider unnecessary in consequence of the interest of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested.

25. When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect.

26. As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary

or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence or mistake, or merely at the desire of the party.

27. As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed.

28. The rules, orders and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act, and the Rules of Court in pursuance thereof, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal.

29. As to all fees or allowances, which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances.

30. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof, objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

31. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

32. Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as to the judge may seem just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

33. Such application shall be heard and determined by the judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the judge shall otherwise direct.

34. When a writ of summons for the commencement of an action shall be issued from a district, and when an action proceeds in a district registry, all fees and allowances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued in London, and if the action proceeded in London, shall apply to such writ of summons issued from and other proceedings in the district registry.

ORDER AS TO COURT FEES UNDER THE SUPREME COURT OF JUDICATURE ACT, 1875.

The 28th day of October, 1875.

“The fees and percentages contained in the schedule hereto are fixed and appointed to be, and shall be taken in the High Court of Justice, and in the Court of Appeal, and in any Court to be created by any commission, and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, and by any officer paid wholly or partly out of public monies who is attached to any of those Courts or the Supreme Court, or any judge of those Courts, or any of them; and the said fees and percentages shall be taken by stamps, except those taken in the district registries, which shall, until further order, be taken in money, and applied and accounted for in such manner as the Treasury may from time to time direct.”

Fees and percentages :
to what
Courts and
offices ap-
plicable.

How to be
taken.

R. 1.

“The fees and percentages set forth in the column headed ‘lower scale’ in the schedule hereto are to be taken and paid in all cases in which the lower scale of fees is to be charged and allowed to solicitors under the provisions of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, issued by Order in Council, dated the 12th day of August, 1875, and the fees and percentages set forth in the column headed

Lower scale.

Higher scale.	“ ‘higher scale’ in the schedule hereto are to be taken and paid in all other cases.” R. 2.
Proceedings by paupers.	“ The existing rules and practice, applicable to proceedings by persons suing in <i>forma pauperis</i> , shall continue and be applicable to proceedings to which this order relates.” R. 5.
Abolition of fees.	“ Save as otherwise provided by this order, all existing fees and percentages which may be taken in any of the Courts whose jurisdiction is, by the Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or Court of Appeal, or in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, or by any officer paid wholly or partly out of public monies who is attached to any of those Courts, or the Supreme Court, or any judge of those Courts, or any of them, shall be and are hereby abolished.” R. 6.
Length of folio.	“ A folio is to comprise 72 words, every figure comprised in a column being counted as one word.” R. 7.
Interpretation of terms.	“ The provisions of Order LXIII. in the first schedule to the Supreme Court of Judicature Act, 1875, shall apply to this order.” R. 8.
Commencement of order.	“ This order shall come into operation at the time of the commencement of the Supreme Court of Judicature Acts, 1873 and 1875.” R. 9.

FORM OF CERTIFICATE FOR PAYING LOWER SCALE OF
COURT FEES ABOVE REFERRED TO.

Title of Cause or Matter.

Lower scale certificate.	“ I hereby certify that to the best of my judgment and belief the lower scale of fees of court is applicable to this case. “ Dated, &c.
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“ A. B.,

“ Solicitor for Plaintiff, or Defendant.”

THE SCHEDULE ABOVE REFERRED TO.

Schedule.

An Order or Rule herein referred to by number shall mean the Order or Rule so numbered in the First Schedule to the Supreme Court of Judicature Act, 1875.

SUMMONSES, WRITS, COMMISSIONS, AND WARRANTS.

Summonses,
&c.

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
On sealing a writ of summons for commencement of an action	0	5	0	0	10	0
On sealing a concurrent, renewed or amended writ of summons for commencement of an action	0	2	6	0	2	6
On sealing a notice for service under Order XVI. Rule 18	0	2	6	0	2	6
On sealing a writ of mandamus or injunction	0	10	0	1	0	0
On sealing a writ of subpoena not exceeding three persons	0	2	6	0	5	0
On sealing every other writ	0	5	0	0	10	0
On sealing a summons to originate proceedings in the Chancery Division	0	5	0	0	10	0
On sealing a duplicate thereof	0	1	0	0	5	0
On sealing a copy of same for service	0	1	0	0	5	0
On sealing or issuing any other summons or warrant	0	2	0	0	3	0
On sealing or issuing a commission to take oaths or affidavits in the Supreme Court	5	0	0	5	0	0
Every other commission	1	0	0	1	0	0
On marking a copy of a petition of right for service	0	1	0	0	5	0

APPEARANCES.

Appearances.

On entering an appearance, for each person	0	2	0	0	2	0
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COPIES.

Copies.

For a copy of a written deposition of a witness to enable a party to print the same, for each folio..	0	0	4	0	0	4
For examining a written or printed copy, and marking same as an office copy, for each folio ..	0	0	2	0	0	2
For making a copy and marking same as an office copy, for each folio	0	0	6	0	0	6
For a copy in a foreign language, the actual cost.						
For a copy of a plan, map, section, drawing, photograph, or diagram, the actual cost.						
For a printed copy of an order not being an office or certified copy, for each folio	0	0	1	0	0	1

Attendances.

ATTENDANCES.

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
On an application, with or without a subpoena, for any officer to attend as a witness, or to produce any record or document to be given in evidence (in addition to the reasonable expenses of the officer) for each day or part of a day he shall necessarily be absent from his office	1	0	0	1	0	0
The officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further expenses which may probably become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application.						
The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited.						

Oaths.

OATHS, &c.

For taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, for each person making the same.....	0	1	6	0	1	6
And in addition thereto for each exhibit therein referred to and required to be marked, whether annexed or not.....	0	1	0	0	1	0

FILING.

Filing.

On filing a special case or petition of right	0	10	0	1	0	0
On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, warrant of attorney, cognovit, bail, satisfaction piece, and writ of execution with return	0	2	0	0	2	0
On filing a scheme pursuant to the statute 30 & 31 Vict. c. 127, or the Liquidation Act, 1868.....	1	0	0	1	0	0
On filing a caveat	0	5	0	0	5	0

Certificates.

CERTIFICATES.

For a certificate of appearance, or of a pleading, affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof	0	1	0	0	4	0
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SEARCHES AND INSPECTIONS.

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
On an application to search for an appearance or an affidavit, and inspecting the same	0	1	0	0	1	0
On an application to search an index, and inspect a pleading, decree, order or other record, unless otherwise expressly provided for by any act of parliament or this Order, and to inspect documents deposited for safe custody or production pursuant to an order, for each hour or part of an hour occupied	0	2	6	0	2	6
Not exceeding on one day	0	10	0	0	10	0

EXAMINATION OF WITNESSES.

				Examination of witnesses.		
For every witness sworn and examined by an examiner or other officer in his office, including oath, for each hour	0	10	0	0	10	0
For an examination of witnesses by any such officer away from the office (in addition to reasonable travelling and other expenses), per day	3	0	0	3	0	0
The officer may require a deposit of stamps on account of fees and a deposit of money on account of expenses, which may probably become payable beyond any amount paid for fees and expenses upon the examination, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof and deliver the same to the party making the deposit						
The officer may also require an undertaking, in writing, to pay any further fees and expenses which may become payable beyond the amount so paid and deposited						
These fees are not to apply to the examination of witnesses for the purpose of any inquiry, taxation of costs, or other proceeding before the officer						

HEARING.

				Hearing.		
For entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause for trial or hearing in any Court in London or Middlesex, or at any assizes, including a demurrer, special case, and petition of right, but not any other petition, nor a summons adjourned from chambers	1	0	0	2	0	0
For a certificate of an associate of the result of trial	1	0	0	1	0	0

Judgments,
&c.

JUDGMENTS, DECREES, AND ORDERS.

	Lower Scale.		Higher Scale.	
	£	s. d.	£	s. d.
For drawing up and entering a judgment, or a decree or decretal order, whether on the original hearing of a cause or on further consideration, including a cause commenced by summons at chambers, and an order on the hearing of a special case or petition, and any order by the Court of Appeal	0	10 0	1	0 0
For drawing up and entering any other order, whether made in Court or at chambers	0	3 0	0	5 0
For copy of a plan, map, section, drawing, photograph, or diagram, required to accompany any order, the actual cost.				

Taxation of
costs.

TAXATION OF COSTS.

For taxing a bill of costs where the amount allowed does not exceed £8	0	2 0	0	4 0
Where the amount exceeds £8, for every £2 allowed or a fraction thereof	0	0 6	0	1 0
These fees, except where otherwise provided, shall be taken on signing the certificate or on the allowance of the bill of costs, as taxed, but the fees shall be due and payable if no certificate or allocatur is required on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.				
The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk on taking such deposit shall make a memorandum thereof on the bill of costs.				
For a certificate or allocatur of the result, not being a judgment	0	0 0	1	0 0
The 58th Rule of Order V. of the Chancery Funds Consolidated Rules, 1874, shall continue in force and be acted upon in cases to which it is applicable.				
On a commitment	0	5 0	0	5 0
On an application to produce judge's notes	0	5 0	0	5 0
On examining and signing inrolments of decrees and orders	3	0 0	3	0 0

In the Probate Courts writs of execution are only resorted to for the purpose of enforcing decrees or orders made by the Court or judge for the payment of money due for costs or otherwise, or for enforcing compliance with any other orders of the Court or judge.

“ Every person to whom any sum of money or any costs shall be payable under a judgment, shall immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of *fi. fa.* or *elegit* may issue. *When fi. fa. or elegit may issue.* or *elegit* to enforce payment thereof, subject nevertheless as follows :

“ (a.) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

“ (b.) The Court or judge at the time of giving judgment, or the Court or a judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of the periods hereinbefore prescribed.” Order XLII. R. 15.

There are four writs to which a person who is entitled, under a decree or order of the Court or judge, to payment of a sum of money, may have recourse primarily for the purpose of enforcing payment—a writ of *fi. fa.*, of *elegit*, of sequestration, and of attachment.

ORDER XLIII.

Writs of Fieri Facias and Elegit.

“ Writs of *fi. fa.* and of *elegit* shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed.” R. 1. *Effect of fi. fa. and elegit.*

ORDER XLVII.

Writ of Sequestration.

Sequestration
how to issue.

“Where any person is by any judgment directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery.”

Effect.

For attachments, see *ante*, pp. 19—29.

Writs in Aid.

Where the objects for which a writ of *fi. fa.* or of *elegit* has been issued cannot be attained, owing to the nature of the property of the defaulter, or to a nominal change in the ownership or otherwise, writs in aid of the former writs may be applied for and obtained.

Writs in aid
of writs of *fi.*
fa. or *elegit*.

“Writs of *renditioni exponas*, *distringas nuper vice comitem*, *feri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *feri facias* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore.

Order XLIII. R. 2.

ORDER XLVIII.

Writ of Possession.

On a judgment for
land.

“A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the Superior Courts of Common Law.” R. 1.

“Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment, and that the same has not been obeyed.” R. 2.

Affidavit to
lead to writ.

ORDER XLIX.

Writ of Delivery.

“A writ for delivery of any property other than land or money may be issued and enforced in the manner here- tofore in use in actions of detinue in the Superior Courts of Common Law.” Order XLIX.

When a writ
of delivery
may issue.

See C. L. P. Act, 1854, s. 78.

WRITS.

F. 1a.

Fieri Facias on order for Costs.

In the High Court of Justice.

18 .

No. .

Probate, Divorce and Admiralty Division.

(Probate.)

Between Plaintiff,
and
. . . . Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of greeting: We command you, that of the goods and chattels of in your bailiwick you cause to be made the sum of for certain costs which by an order of Our High Court of Justice dated the day of , 18 were ordered to be paid by the said to and which have been taxed and allowed at the said sum, and interest on the said sum at the rate of 4l. per centum per annum from the day of , 18 , and that you have the said sum and interest before us in our said Court, immediately after the execution hereof, to be rendered to the said . And in what manner you shall have executed this our writ make appear to us immediately after the execution hereof. And have there then this writ.

Witness, , Lord High Chancellor of Great Britain, the day of , 18 .

Levy £ and £ for costs of execution, &c., and also interest interest on £ at 4l. per centum per annum from the day of

, 18 , until payment ; besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses.

This writ was issued by _____ of _____, agent for _____ of _____ solicitor for the _____.

The _____ is a _____ and resides at _____ in your bailiwick.

APPENDIX F.

FORMS OF WRITS.

1. *Writ of Fieri Facias.*

188 . B. No. .

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate)

Between A. B. Plaintiff,
and

C. D. and others Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of _____ greeting.

We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ _____ and also interest thereon at the rate of £ _____ per centum per annum from the _____ day of _____ * which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or certain actions, as the case may be*] wherein A. B. is plaintiff and C. D. and others are defendants [*or in a certain matter there depending intituled "In the matter of E. F." as the case may be*] by a judgment [*or order, as the case may be*] of our said Court, bearing date the _____ day of _____ adjudged [*or ordered, as the case may be*] to be paid by the said C. D. to A. B., together with certain costs in the said judgment [*or order, as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing masters of our said Court at the sum of £ _____ as appears by the certificate of the said taxing master, dated the _____ day of _____. And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ _____ [costs] together with interest thereon at the rate of 4l. per centum per annum from the _____ day of _____, † and that you have that money and interest before us in our said Court

* Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

† The date of the certificate of taxation. The writ *must* be so moulded as to follow the substance of the judgment or order.

immediately after the execution hereof to be paid to the said A. B. in pursuance of the said judgment [*or order, as the case may be*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

2. *Writ of Elegit.*

188 . B. No. .

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate).

Between A. B. . . . Plaintiff,

and

C. D. and others . . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of . . . greeting.

Whereas lately in our High Court of Justice in a certain action [*or certain actions, as the case may be*] there depending, wherein A. B. is plaintiff and C. D. and others are defendants [*or in a certain matter there depending, intituled "In the matter of E. F.," as the case may be*] by a judgment [*or order, as the case may be*] of our said Court made in the said action [*or matter, as the case may be*], and bearing date the . . . day of . . . , it was adjudged [*or ordered, as the case may be*] that C. D. should pay unto A. B. the sum of £ . . . , together with interest thereon after the rate of £ . . . per centum per annum from the . . . day of . . . , together also with certain costs as in the said judgment [*or order, as the case may be*] mentioned, and which costs have been taxed and allowed by . . . one of the taxing masters of our said Court, at the sum of £ . . . as appears by the certificate of the said taxing master, dated the . . . day of And afterwards the said A. B. came into our said Court, and according to the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said C. D., or any one in trust for him, was seised or possessed of on the . . . day of . . . in the year of our Lord . . . * or at any time afterwards, or over which the said C. D. on the said . . . day of . . . or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and

* The day on which the judgment or order was made.

tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest upon the said sum of £ , at the rate of £ per centum per annum from the said day of , and on the said sum of £ (costs) at the rate of £4 per centum per annum from the day of shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price and extent all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands and tenements rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said day of * or at any time afterwards, or over which the said C. D. on the said day of , * or at any time afterwards had any disposing power which he might without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B., as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said two several sums of £ and £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court aforesaid, immediately after the execution thereof, under your seals, and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness ourselves at Westminster, &c.

Writ of Venditioni Exponas.

1875. B. No. .

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate.)

Between A. B. . . . Plaintiff,

and

C. D. and others . . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

Whereas by our writ we lately commanded you that of the goods and chattels of C. D. [*here recite the fieri facias to the end*]. And on the day of you returned to us in the Division of our High Court of Justice aforesaid, that by virtue of the said writ to you directed you had taken goods and chattels of the said C. D. to the value of the money and interest aforesaid, which said goods and chattels remained in your

* The day on which the decree or order was made.

hands unsold for want of buyers. Therefore we, being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you that you expose to sale and sell, or cause to be sold, the goods and chattels of the said C. D., by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Justice immediately after the execution hereof, to be paid to the said A. B. And have there then this writ.

Witness ourself at Westminster, the day of in the
year of our reign.

4. *Writ of Fieri Facias de Bonis Ecclesiasticis.*

1875. B. No. .

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate.)

Between A. B. . . . Plaintiff,
and
C. D. and others . . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Right Reverend Father in God [*John*] by Divine permission Lord Bishop of greeting: We command you, that of the ecclesiastical goods of C. D., clerk in your diocese, you cause to be made £ which lately before us in our High Court of Justice in a certain action [*or certain actions, as the case may be*] wherein A. B. is plaintiff and C. D. is defendant [*or in a certain matter there depending, intituled "In the matter of E. F." as the case may be*], by a judgment [*or order, as the case may be*] of our said Court bearing date the day of , was adjudged [*or ordered, as the case may be*] to be paid by the said C. D. to the said A. B., together with interest on the said sum of at the rate of £ per centum per annum, from the day of , and have that money, together with such interest as aforesaid, before us in our said Court immediately after the execution hereof, to be rendered to the said A. B., for that our sheriff of returned to us in our said Court on [*or "at a day now past"*] that the said C. D. had not any goods or chattels or any lay fee in his bailiwick whereof he could cause to be made the said £ and interest aforesaid or any part thereof, and that the said C. D. was a beneficed clerk (to wit) rector of rectory [*or vicar of the vicarage*] and parish church of in the said sheriff's county, and within your diocese [*as in the return*], and in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution hereof, and have you there then this writ.

Witness ourself at Westminster, the day of , in the year of
our Lord .

5. *Writ of Fieri Facias to the Archbishop de bonis Ecclesiasticis during the vacancy of a Bishop's See.*

Victoria, [*&c. as in the preceding form*]: To the Right Reverend Father in God [*John*] by Divine Providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, greeting: We command you, that of the ecclesiastical goods of C. D., clerk in the diocese of which is within the province of Canterbury, as ordinary of that church, the episcopal see of now being vacant, you cause to be made [*&c., conclude as in the preceding form*].

6. *Writ of Sequestrari Facias de bonis Ecclesiasticis.*

1875. B. No.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate.)

Between A B. . . . Plaintiff,
and

C. D. and others . . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Right Reverend Father in God [*John*] by Divine permission Lord Bishop of greeting: Whereas we lately commanded our sheriff of that he should omit not by reason of any liberty of his county, but that he should enter the same, and cause [to be made, *if after the return to a fieri facias, or delivered, if after the return to an elegit, &c., and in either case recite the former writ*]. And whereupon our said sheriff of on [or "at a day past"] returned to us in the Division of our said Court of Justice, that the said C. D. was a beneficed clerk; that is to say, rector of the rectory [or vicar of the vicarage] and parish church of in the county of , and within your diocese, and that he had not any goods or chattels, or any lay fee in his bailiwick [*here follow the words of the sheriff's return*]. Therefore, we command you that you enter into the said rectory [or vicarage] and parish church of , and take and sequester the same into your possession, and that you hold the same in your possession until you shall have levied the said £ and interest aforesaid, of the rents, tithes, rent-charges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in your diocese of and belonging to the said rectory [or vicarage] and parish church of , and to the said C. D. as rector [or vicar] thereof to be rendered to the said A. B., and what you shall do therein make appear to us in our said Court immediately after the execution hereof, and have you there then this writ.

Witness ourself at Westminster, the day of in the year of our Lord .

7. *Writ of Possession.*

187 . B. No.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate.)

Between A. B. . . . Plaintiff,

and

C. D. and others . . . Defendants.

Victoria, to the sheriff of , greeting: Whereas lately in our High Court of Justice, by a judgment of the division of the same Court [A. B. recovered] or [E. F. was ordered to deliver to A. B.] possession of all that with the appurtenances in your bailiwick: Therefore, we command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause the said A. B. to have possession of the said land and premises with the appurtenances. And in what manner you have executed this our writ make appear to the judges of the Division of our High Court of Justice immediately after the execution hereof, and have you there then this writ.

Witness, &c.

8. *Writ of Delivery.*

187 . B. No.

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate.)

Between A. B. . . . Plaintiff,

and

C. D. and other . . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of greeting: We command you, that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue*], to be returned to A. B., which the said A. B. lately in our recovered against C. D. [*or C. D. was ordered to deliver to the said A. B.*] in an action in the division of our said Court. And we further command you, that if the said chattels cannot be found in your bailiwick, you distrain the said C. D. by all his lands and chattels in your bailiwick, so that neither the said C. D. nor any one for him do lay hands on the same until the said C. D. render to the said A. B. the said chattels; and in what manner you shall have executed this our writ make appear to the judges of the Division of our High Court of Justice, immediately after the execution hereof, and have you there then this writ.

Witness, &c.

The like, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on Defendant's Goods the assessed Value of it.

[*Proceed as in the preceding form until the *, and then thus:*] And we further command you, that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said C. D. in your bailiwick you cause to be made £ [the assessed value of the chattels], and in what manner you shall have executed this our writ make appear to the judges of the Division of our High Court of Justice at Westminster immediately after the execution hereof, and have you there then this writ.

Witness, &c.

9. Writ of Attachment

18 . B. No. .

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate).

Between A. B. Plaintiffs,

and

C. D. and others . . . Defendants.

Victoria, &c.

To the sheriff of , greeting:

We command you to attach C. D. so as to have him before us in the

Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you.

Witness, &c.

10. Writ of Sequestration.

18 . B. No. .

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

(Probate.)

Between A. B. Plaintiff,

and

C. D. and others . . . Defendants.

Victoria, &c.

To [*names of not less than four Commissioners*] greeting:

Whereas lately in the Division of our High Court of Justice in a certain action there depending, wherein A. B. is plaintiff and C. D. and others are defendants [*or, in a certain matter then depending, intituled "In the matter of E. F.," as the case may be*] by a judgment [*or order, as the case may be*] of our said Court made in the said action [*or*

matter], and bearing date the day of , 18 , it was ordered that the C. D. should [pay into Court to the credit of the said action the sum of £ , *or as the case may be*]. Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said C. D., and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estates whatsoever; and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estates of the said C. D., and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said C. D. shall [pay into Court to the credit of the said action the sum of £ , *or as the case may be*] clear his contempt, and our said Court make other order to the contrary.

Witness, &c.

ORDER XLII.

Execution.

“ A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the said Act might have been enforced at the time of the passing thereof.” R. 1.

Judgment for recovery of money.

“ A judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law, by attachment.” R. 2.

Judgment for payment into Court.

“ A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.” R. 3.

Judgment for recovery or delivery of land.

“ A judgment for the recovery of any property other than land or money may be enforced :

“ By writ for delivery of the property :

“ By writ of attachment :

“ By writ of sequestration.” R. 4.

Judgment requiring any one to do or abstain from doing anything.

Meaning of writ of execution, and issuing execution.

Judgment for conditional relief.

Judgment against partners.

“A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.” R. 5.

“In these rules the term ‘writ of execution’ shall include writs of fieri facias, capias, elegit, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term ‘issuing execution against any party’ shall mean the issuing of any such process against his person or property as under the preceding rules of this Order shall be applicable to the case.” R. 6.

“Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a judge for leave to issue execution against such party. And the Court or judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried.” R. 7.

“Where a judgment is against partners in the name of the firm, execution may issue in manner following :

“(a) Against any property of the partners as such :

“(b) Against any person who has admitted on the pleadings that he is, or has been adjudged to be a partner :

“(c) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

“If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court

“ or a judge for leave so to do ; and the Court or judge
 “ may give such leave if the liability be not disputed, or if
 “ such liability be disputed, may order that the liability of
 “ such person be tried and determined in any manner in
 “ which any issue or question in an action may be tried
 “ and determined.” R. 8.

“ No writ of execution shall be issued without the pro- Documents
 “ duction to the officer by whom the same should be issued, to be pro-
 “ of the judgment upon which the writ of execution is to duced.
 “ issue, or an office copy thereof, showing the date of entry.
 “ And the officer shall be satisfied that the proper time has
 “ elapsed to entitle the judgment creditor to execution.”
 R. 9.

“ No writ of execution shall be issued without the party Præcipe for
 “ issuing it, or his solicitor, filing a præcipe for that writ.
 “ pose. The præcipe shall contain the title of the action,
 “ the reference to the record, the date of the judgment,
 “ and of the order, if any, directing the execution to be
 “ issued, the names of the parties against whom, or of the
 “ firms against whose goods, the execution is to be issued ;
 “ and shall be signed by or on behalf of the solicitor of
 “ the party issuing it, or by the party issuing it, if he do
 “ so in person. The forms in Appendix (E.) hereto may
 “ be used, with such variations as circumstances may re-
 “ quire.” R. 10.

“ Every writ of execution shall be endorsed with the Indorsement
 “ name and place of abode or office of business of the of name and
 “ solicitor actually suing out the same, and when the address of
 “ solicitor actually suing out the writ shall sue out the solicitor,
 “ same as agent for another solicitor, the name and place agent, party
 “ of abode of such other solicitor shall also be indorsed or person.
 “ upon the writ ; and in case no solicitor shall be employed
 “ to issue the writ, then it shall be indorsed with a memo-
 “ randum expressing that the same has been sued out by
 “ the plaintiff or defendant in person, as the case may be,
 “ mentioning the city, town, or parish, and also the name
 “ of the hamlet, street, and number of the house of such

“ plaintiff’s or defendant’s residence, if any such there
“ be.” R. 11.

Date of writ. “ Every writ of execution shall bear date of the day on
“ which it is issued. The forms in Appendix (F.) hereto
“ may be used, with such variations as circumstances may
“ require.” R. 12.

Poundage
fees and ex-
penses. “ In every case of execution the party entitled to execu-
“ tion may levy the poundage, fees, and expenses of
“ execution, over and above the sum recovered.” R. 13.

Indorsement
of direction
to sheriff. “ Every writ of execution for the recovery of money
“ shall be indorsed with a direction to the sheriff, or other
“ officer or person to whom the writ is directed, to levy the
“ money really due and payable and sought to be reco-
“ vered under the judgment, stating the amount, and also
“ to levy interest thereon, if sought to be recovered, at the
“ rate of 4/. per cent. per annum from the time when the
“ judgment was entered up, provided that in cases where
“ there is an agreement between the parties that more
“ than 4/. per cent. interest shall be secured by the judg-
“ ment, then the indorsement may be accordingly to levy
“ the amount of interest so agreed.” R. 14.

Currency of
writ.
Renewal. “ A writ of execution if unexecuted shall remain in force
“ for one year only from its issue, unless renewed in the
“ manner hereinafter provided; but such writ may, at any
“ time before its expiration, by leave of the court or a
“ judge, be renewed, by the party issuing it, for one year
“ from the date of such renewal, and so on from time to
“ time during the continuance of the renewed writ, either
“ by being marked with a seal of the court bearing the
“ date of the day, month, and year of such renewal, or by
“ such party giving a written notice of renewal to the
“ sheriff, signed by the party or his attorney, and bearing
“ the like seal of the court; and a writ of execution so
“ renewed shall have effect, and be entitled to priority,
“ according to the time of the original delivery thereof.”
R. 16.

Evidence of
renewal. “ The production of a writ of execution, or of the notice

“renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.” R. 17.

“As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.” R. 18.

Execution within six years of judgment.

“Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms, as to costs or otherwise, as shall seem just.” R. 19.

Execution after six years with leave.

“Every order of the Court or a judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect.” R. 20.

Execution or orders.

“In cases other than those mentioned in Rule 18 any person not being a party in an action, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action.” R. 21.

Execution by or against a person not a party.

“No proceeding by *audita querela* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a judge for a stay of execution or other relief against such judgment, upon

Stay of execution.

- “the ground of facts which have arisen too late to be pleaded; and the Court or judge may give such relief and upon such terms as may be just.” R. 22.
- Saving previous rights. “Nothing in any of the rules of this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever.” R. 23.
- Order of issue of writs. “Nothing in this order shall affect the order in which writs of execution may be issued.” R. 24.

ORDER XLV.

Attachment of Debts.

- Application for exoneration of judgment debtor. “Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to the Court or a judge for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him, before an officer of the Court, or such other person as the Court or judge shall appoint; and the Court or judge may make an order for the examination of such judgment debtor, and for the production of any books or documents.” R. 1.
- Order attaching debts. Order nisi on garnishee. “The Court or a judge may, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a judge or an officer of the Court, as such Court or judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so

“much thereof as may be sufficient to satisfy the judgment debt.” R. 2.

“Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Court or judge shall direct shall bind such debts in his hands.” R. 3.

Service of
order on
garnishee.

“If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Court or judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt.” R. 4.

Order for
execution
against gar-
nishee.

“If the garnishee disputes his liability, the Court or judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.” R. 5.

Issue if gar-
nishee dis-
putes lia-
bility.

“Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or judge may order such third person to appear, and state the nature and particulars of his claim upon such debt.” R. 6.

Order for
third person
to appear.

“After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Court or judge may order to appear, or in case of such third person not appearing when ordered, the Court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this order, and

Proceedings
as to claim
of third per-
sons.

- “ may bar the claim of such third person, or make such
 “ other order as such Court or judge shall think fit, upon
 “ such terms, in all cases, with respect to the lien or charge
 “ (if any) of such third person, and to costs, as the Court
 “ or judge shall think just and reasonable.” R. 7.
- Discharge of
garnishee. “ Payment made by or execution levied upon the
 “ garnishee under any such proceeding as aforesaid, shall
 “ be a valid discharge to him as against the judgment
 “ debtor, to the amount paid or levied, although such pro-
 “ ceeding may be set aside, or the judgment reversed.”
 R. 8.
- Debt attach-
ment book. “ There shall be kept by the proper officer a debt attach-
 “ ment book, and in such book entries shall be made of the
 “ attachment and proceedings thereon, with names, dates,
 “ and statements of the amount recovered, and otherwise ;
 “ and copies of any entries made therein may be taken by
 “ any person upon application to the proper officer.” R. 9.
- Costs. “ The costs of any application for an attachment of
 “ debts, and of any proceedings arising from, or incident
 “ to such application, shall be in the discretion of the Court
 “ or a judge.” R. 10.

ORDER XLVI.

Charging of Stock or Shares and Distringas.

- Charging
order. “ An order charging stock or shares may be made by
 “ any Divisional Court or by any judge, and the proceed-
 “ ings for obtaining such order shall be such as are directed,
 “ and the effect shall be such as is provided by 1 & 2 Vict.
 “ c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1.” R. 1.
- Distringas. “ Any person claiming to be interested in any stock
 “ transferable at the bank of England standing in the
 “ name of any other person may sue out a writ of dis-
 “ tringas pursuant to the statute 5 Vict. c. 8, as heretofore.
 “ Such writ to be issued out of any office of the High Court
 “ in London, where writs of summons are issued.” R. 2.

ORDER XLVI. (*App.* 1880).

“ Order XLVI. rule 2, is hereby annulled, and no writ of distringas shall hereafter be issued under the act 5 Viet. c. 5, s. 5.” R. 21.

Writ of distringas not to issue.
Order XLVI.
R. 2a.

“ In the following rules of this order the expression ‘ company ’ includes the governor and company of the bank of England and any other public company, whether incorporated or not, to which 5 Viet. c. 5, s. 5, applies and the expression ‘ stock ’ includes shares, securities, and money.” R. 22.

Meaning of “ company ” and “ stock.”
Order XLVI.
R. 3.

“ Any person claiming to be interested in any stock standing in the books of a company may, on making an affidavit in or to the effect of the form B. 28 in the schedule hereto, and on filing the same in the central office with a notice in or to the effect of the form B. 23 in the same schedule annexed thereto, and on procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the central office, serve the office copy and duplicate notice on the company.” R. 23.

Filing and service of affidavit and notice as to stock.
Order XLVI.
R. 4.

“ There shall be appended to the affidavit a note stating the person on whose behalf it is filed, and to what address notices (if any) for that person are to be sent. All such notices shall be deemed to have been duly sent if sent through the post by a prepaid letter directed to that person at the address so stated or at any such substituted address as hereinafter mentioned, whether the person to whom the notice is sent is living or not.” R. 24.

Affidavit to state address of claimant.
Order XLVI.
R. 5.

“ The address so stated may, from time to time, be altered by the person by or on whose behalf the affidavit is filed, but all notices sent by post before the alteration to the address originally given or for the time being substituted therefor shall not be affected by any subsequent alteration. Any such alteration of address may be made by service of a memorandum thereof on the company

Alteration of address.
Order XLVI.
R. 6.

“ in the manner required for service of a notice under this order.” R. 25.

Service of affidavit and filed notice to have same effect as writ of distringas. Order XLVI. R. 7.

“ The service of the office copy of the affidavit and of the duplicate of the filed notice shall for the period of five years from the day of service, but not longer, (unless the notice is renewed as after mentioned), have the same force and effect as if these rules had not been made and a writ of distringas in respect of the stock had been duly issued under the act 5 Vict. c. 5, s. 5.” R. 26.

Renewal of notice. Order XLVI. R. 8.

“ The original notice may be kept on foot from time to time by a notice of renewal signed by the person by whom or on whose behalf the original notice was given, and served on the company, provided the notice of renewal, if only one is given, is served before the expiration of five years from the day on which the original notice was served, or, if more than one is given, then before the expiration of five years from the day on which the last previous notice of renewal was served. Each such notice of renewal shall have the effect of continuing and keeping on foot the original notice for the period of five years from the day on which the first notice of renewal or the last previous notice of renewal (as the case may be) was served.” R. 27.

Withdrawal or discharge of notice. Order XLVI. R. 9.

“ A notice filed under this order may at any time be withdrawn by the person by whom or on whose behalf it was given on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice or by petition duly served by any other person claiming to be interested in the stock sought to be affected by the notice.” R. 28.

Effect of request for transfer of stock or payment of dividend. Order XLVI. R. 10.

“ If, whilst a notice filed under this order continues in force, the company on whom it is served receive from the person in whose name the stock specified in the notice is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends thereon, the company shall not by force or in consequence of the service or of

“any renewal of the notice, be authorized, without the order of the court, to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request.”
R. 29.

“If the person who files a notice under this order desires to correct the description of the stock referred to in the filed notice he may file an amended notice and serve on the company a duplicate thereof sealed with the seal of the central office, and in that case the service of the notice shall be deemed to have been made on the day on which the amended duplicate is so served.” R. 30.

Amendment
of description
of stock.
Order XLVI.
R. 11.

ORDER LXA.

Central Office.

“The official seals to be used in the central office shall be such as the Lord Chancellor from time to time directs.”

Seals of cen-
tral office.
Order LXA.
R. 5.

“All copies, certificates, and other documents appearing to be sealed with a seal of the central office shall be presumed to be office copies or certificates or other documents issued from the central office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the central office, shall be required for the authentication of any such copy, certificate, or other document.” R. 45.

“All deeds which by any statute or statutory rule are directed or permitted to be enrolled in any of the courts whose jurisdiction has been transferred to the High Court of Justice may be enrolled in the enrolment department of the central office.” R. 46.

Enrolment
of deeds.
Order LXA.
R. 6.

“The registrar of judgments shall not receive any memorandum of a judgment, execution, *lis pendens*, order, rule, annuity, crown debt, or other incumbrance, or any memorandum of satisfaction relating to the same, for registration, after the hour of two in the afternoon.”

Judgments,
&c. not to
be registered
after 2 p.m.
Order LXA.
R. 7.

R. 47.

Restrictions
on removal
of documents
from central
office.
Order LXA.
R. 11.

“ No affidavit or record of the Court shall be taken out
“ of the central office without the order of a judge or
“ master, and no subpoena for the production of any such
“ document shall be issued.” R. 51.

ORDER LXI.

Sittings and Vacations.

- Sittings. “ The sittings of the Court of Appeal and the sittings in
“ London and Middlesex of the High Court of Justice
“ shall be four in every year, viz., the Michaelmas sittings,
“ the Hilary sittings, the Easter sittings, and the Trinity
“ sittings.
- Michaelmas, “ The Michaelmas sittings shall commence on the 2nd
“ of November and terminate on the 21st of December;
- Hilary, “ the Hilary sittings shall commence on the 11th of
“ January and terminate on the Wednesday before
- Easter and “ Easter; the Easter sittings shall commence on the
“ Tuesday after Easter week and terminate on the Friday
“ before Whitsunday.
- Trinity. “ The Trinity sittings shall commence on the Tuesday
“ after Whitsun week and terminate on the 8th of August.”
R. 1.
- “ The vacations to be observed in the several courts and
“ offices of the Supreme Court shall be four in every year,
“ viz., the Long Vacation, the Christmas Vacation, the
“ Easter Vacation, and the Whitsun Vacation.
- Long Vacaa- “ The Long Vacation shall commence on the 10th of
tion, “ August and terminate on the 24th of October. The
- Christmas, “ Christmas Vacation shall commence on the 24th of
“ December and terminate on the 6th of January.
- Easter, “ The Easter Vacation shall commence on Good Friday
- Whitsun, “ and terminate on Easter Tuesday, and the Whitsun
“ Vacation shall commence on the Saturday before Whit-
“ sunday and shall terminate on the Tuesday after Whit-
“ sunday.” R. 2.

“The days of the commencement and termination of each sitting and vacation shall be included in such sitting and vacation respectively.” R. 3.

Days of
commence-
ment and
conclusion.

“The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving.” R. 4.

Offices of
Supreme
Court when
open.

“The offices of each district registrar of the High Court of Justice shall be open on every day and hour in the year on which the offices of the registrar of the County Court of the place in which the district registry is situate are required to be kept open.” R. 4 a.

District
registries.

“The offices of the Supreme Court (including the judges’ chambers) shall close on Saturdays at 2 o’clock.” R. 4 b.

Hours on
Saturdays.

“Two of the judges of the High Court shall be selected at the commencement of each long vacation for the hearing in London or Middlesex during vacation of all such applications as may require to be immediately or promptly heard. Such two judges shall act as vacation judges for one year from their appointment. In the absence of arrangement between the judges, the two vacation judges shall be the two judges last appointed (whether as judges of the said High Court or of any Court whose jurisdiction is by the said Act transferred to the said High Court) who have not already served as vacation judges of any such Court, and if there shall not be two judges for the time being of the said High Court who shall not have so served, then the two vacation judges shall be the judge (if any) who has not so served and the senior judge or judges who has or have so served once only according to seniority of appointment, whether in the said High Court or such other Court as

Vacation
judges.

Sittings of
vacation
judges.

“aforesaid. The lord chancellor shall not be liable to
“serve as a vacation judge.” R. 5.

“The vacation judges may sit either separately or
“together as a Divisional Court as occasion shall require,
“and may hear and dispose of all actions, matters, and
“other business to whichever division the same may be
“assigned. No order made by a vacation judge shall be
“reversed or varied except by a Divisional Court or the
“Court of Appeal, or a judge thereof, or the judge who
“made the order. Any other judge of the High Court
“may sit in vacation for any vacation judge.” R. 6.

Business to
be disposed
of by vacation
judges.

“The vacation judges of the High Court may dispose
“of all actions, matters, and other business of an urgent
“nature during any interval between the sittings of any
“division of the High Court to which such business may
“be assigned, although such interval may not be called
“or known as a vacation.” R. 7.

ORDER LXI.

Sittings and Vacations.

Office hours.
Order LXI.
R. 4c.

“The office hours in the several offices of the Supreme
“Court, other than the summons and order, crown office,
“and associates departments of the central office, shall be
“from ten in the forenoon to four in the afternoon, except
“on Saturday and in vacation, when the offices shall close
“at two in the afternoon. In the excepted departments
“the hours shall be from eleven in the forenoon to five
“in the afternoon, except on Saturday and in vacation,
“when the hours shall be from eleven in the forenoon to
“three in the afternoon.” R. 53.

ORDER LXIII.

Interpretation of Terms.

“The provisions of the 100th section of the Act shall
“apply to these rules.”

SECT. 100, JUDICATURE ACT, 1873.

“ In the construction of this Act, unless there is any-
 “ thing in the subject or context repugnant thereto, the
 “ several words hereinafter mentioned shall have, or in-
 “ clude, the meanings following ; (that is to say,)

Interpretation
 of terms.

Sect. 100,
 Jud. Act,
 1873.

“ ‘ Rules of Court ’ shall include forms.

“ ‘ Cause ’ shall include any action, suit, or other original
 “ proceeding between a plaintiff and a defendant,
 “ and any criminal proceeding by the Crown.

“ ‘ Suit ’ shall include action.

“ ‘ Action ’ shall mean a civil proceeding commenced by
 “ writ, or in such other manner as may be pre-
 “ scribed by Rules of Court ; and shall not include
 “ a criminal proceeding by the Crown.

“ ‘ Plaintiff ’ shall include every person asking any relief
 “ (otherwise than by way of counter-claim as a de-
 “ fendant) against any other person by any form of
 “ proceeding, whether the same be taken by action,
 “ suit, petition, motion, summons, or otherwise.

“ ‘ Petitioner ’ shall include every person making any
 “ application to the Court, either by petition, mo-
 “ tion, or summons, otherwise than as against any
 “ defendant.

“ ‘ Defendant ’ shall include every person served with
 “ any writ of summons or process, or served with
 “ notice of, or entitled to attend any proceedings.

“ ‘ Part ’ shall include every person served with notice
 “ of, or attending any proceeding, although not
 “ named on the record.

“ ‘ Matter ’ shall include every proceeding in the Court
 “ not in a cause.

“ ‘ Pleading ’ shall include any petition or summons, and
 “ also shall include the statements in writing of the
 “ claim or demand of any plaintiff, and of the de-
 “ fence of any defendant thereto, and of the reply

- “ of the plaintiff to any counter-claim of a defendant.
- “ ‘Judgment’ shall include decree.
- “ ‘Order’ shall include rule.
- “ ‘Oath’ shall include solemn affirmation and statutory declaration.
- “ ‘Existing’ shall mean existing at the time appointed
“ for the commencement of this Act.” Sect. 100,
Jud. Act, 1873.

ORDER LXIII.

“ In the construction of these rules, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following :—

- “ ‘Person’ shall include a body corporate or politic :
- “ ‘Probate actions’ shall include actions and other
“ matters relating to the grant or recall of probate
“ or of letters of administration other than common
“ form business :
- “ ‘Proper officer’ shall, unless and until any rule to the
“ contrary is made, mean an officer to be ascertained as follows :—
 - “ (a.) Where any duty to be discharged under
“ the Act or these rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same :
 - “ (b.) Where any new duty is under the Act or these rules to be discharged, the proper officer to discharge the same shall be such officer, having previously discharged analogous duties, as may from time to time be directed to discharge the same, in the case of an officer of the Supreme Court, or the High Court of Justice, or the Court of Appeal, not attached to any division, by the lord chancellor, and in the case of an officer

“ attached to any division, by the president of the
 “ division, and in the case of an officer attached to
 “ any judge, by such judge :

“ ‘The Act’ and ‘the said Act’ shall respectively mean
 “ the Supreme Court of Judicature Act, 1873, as
 “ amended by this Act.”

ORDER, APRIL, 1880.

“ In these rules the expression ‘central office’ means the
 “ central office of the Supreme Court of Judicature ; and
 “ the expression ‘master’ means a master of the Supreme
 “ Court of Judicature.

Interpreta-
 tion of terms.
 Order LXIII.
 R. 2.

“ In the Supreme Court of Judicature (Officers) Act,
 “ 1879, and in Order LX., the expression ‘officer of the
 “ Supreme Court’ shall mean any officer paid wholly or
 “ partly out of public money who is attached to the
 “ Supreme Court, the High Court of Justice, or the Court
 “ of Appeal, or to any judge of any of those Courts, and
 “ is not an officer attached to the person of a judge, and
 “ removable by him at pleasure.

“ The term ‘these rules’ as used in the rules of the
 “ Supreme Court shall include any rules made in amend-
 “ ment of or addition to those rules.” R. 60.

APPENDIX.

I. STATUTES.

1 VICTORIÆ, c. 26.

An Act for the Amendment of the Laws with respect to Wills. [3rd July, 1837.]

BE it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures *in capite* and by Knight's Service and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an Act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries and Tenures *in capite* and by Knight's Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the

Meaning of certain words in this Act.

"Will;"

12 Car. 2, c. 24.

"Real estate;"

"Personal estate;"

Number; executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Gender. II. And be it further enacted, that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two Parts of his Land;" and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an Act passed in the parliament of Ireland in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, &c. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an Act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate, being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an Act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice" as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries and to explain and amend an Act made in the Twenty-ninth Year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates *pur autre vie*; and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America," except so far as relates to his majesty's colonies and plantations in America; and also an Act passed in the parliament of Ireland in

Repeal of the Statutes of
of Wills,
32 H. 8, c. 1,
and 34 & 35
H. 8, c. 5.

10 Car. 1,
sess. 2, c. 2,
(I.).

Sects. 5, 6, 12,
19, 20, 21,
Statute of
Frauds,
29 Car. 2, c. 3;
7 W. 3, c. 12
(I.).

Sect. 14 of
4 & 5 Anne,
c. 16.

6 Anne, c. 10
(I.).

Sect. 9 of
14 G. 2, c. 20.

25 G. 2, c. 6
(except as to
colonies).

the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates;" and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates *pur autre vie* to which this Act does not extend.

25 G. 2, c. 11
(I).

55 G. 3, c. 192.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estates, as the testator may be entitled to at the time of his death, not-

All property may be disposed of by will,

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates *pur autre vie*;

contingent interests;

rights of entry; and property acquired after execution of the will.

withstanding that he may become entitled to the same subsequently to the execution of his will.

As to the fees and fines payable by devisees of customary and copyhold estates.

IV. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

V. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot,

and the lord to be entitled

dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

to the same fine, &c. when such estates are not now devisable as he would have been from the heir in case of descent.

Estates *pur autre vie*.

No will of a person under age valid;

nor of a feme covert, except such as might now be made.

Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

Soldiers and mariners' wills excepted.

Act not to affect certain provisions of 11 G. 4 & 1 W. 4. c. 20, with respect to wills of petty officers and seamen and marines.

Publication not to be requisite.

Will not to be void on account of incompetency of attesting witness.

Gifts to an attesting witness to be void.

Creditor attesting to be admitted a witness.

Executor to be admitted a witness.

Will to be revoked by marriage.

XII. And be it further enacted, that this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his majesty King George the Fourth and in the first year of the reign of his late majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her majesty's navy.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person

entitled as his or her next of kin, under the Statute of Distributions).

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances.

No will to be revoked by presumption.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

No alteration in a will shall have any effect unless executed as a will.

XXII. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

XXIII. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

A devise not to be rendered inoperative by any subsequent conveyance or act.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A will shall be construed to speak from the death of the testator.

A residuary devise shall include estates comprised in lapsed and void devises.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

A general gift shall include estates over which the testator has a general power of appointment.

A devise without any words of limitation shall be construed to pass the fee.

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

XXV. And be it further enacted, that, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

XXVI. And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

XXVII. And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

XXVIII. And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

XXIX. And be it further enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed

to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

XXX. And be it further enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

XXXI. And be it further enacted, that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

XXXII. And be it further enacted, that where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

XXXIII. And be it further enacted, that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

Trustees under unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

Devises of estates tail shall not lapse.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Act not to extend to wills made before 1838, nor to estates *pur autre vie* of persons who die before 1838.

XXXIV. And be it further enacted, that this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January one thousand eight hundred and thirty-eight.

Act not to extend to Scotland.

XXXV. And be it further enacted, that this Act shall not extend to Scotland.

Act may be altered this session.

XXXVI. And be it enacted, that this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present session of parliament.



15 & 16 VICTORIÆ, c. 24.

An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled An Act for the Amendment of the Laws with respect to Wills.
[17th June, 1852.]

WHEREAS the laws with respect to the execution of wills require further amendment: be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same (as follows):

1 Vict. c. 26.

When signature to a will shall be deemed valid.

I. Where by an Act passed in the first year of the reign of her majesty Queen Victoria, intituled "An Act for the amendment of the Laws with respect to Wills," it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a

blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

II. The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court of competent jurisdiction, in consequence of the defective execution of such will.

Act to extend to certain wills already made.

III. The word "will" shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said Act of the first year of the reign of her majesty Queen Victoria.

Interpretation of "will."

IV. This Act may be cited as "The Wills Act Amendment Act, 1852."

Short title of Act.



24 & 25 VICTORIA, c. 114.

An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects. [6th August, 1861.]

BE it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Wills made out of the kingdom to be admitted if made according to the law of the place where made.

1. Every will and other testamentary instrument made out of the united kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her majesty's dominions where he had his domicile of origin.

Wills made in the kingdom to be admitted if made according to local usage.

2. Every will and other testamentary instrument made within the united kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the united kingdom where the same is made.

Change of domicile not to invalidate will.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Nothing in this Act to invalidate wills otherwise made.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

Extent of Act.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.



33 & 34 VICTORIA, c. 93.

An Act to amend the Law relating to the Property of Married Women. [9th August, 1870.]

WHEREAS it is desirable to amend the law of property and contract with respect to married women :

Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows :

1. The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money and property.

Earnings of married women to be deemed their own property.

2. Notwithstanding any provision to the contrary in the Act of the tenth year of George the Fourth, chapter twenty-four, enabling the commissioners for the reduction of the national debt to grant life annuities and annuities for terms of years, or in the Acts relating to savings banks and post office savings banks, any deposit hereafter made and any annuity granted by the said commissioners under any of the said Acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman ; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such deposit or annuity or any part thereof to be paid to the husband.

Deposits in savings banks by a married woman to be deemed her separate property.

Proviso.

3. Any married woman, or any woman about to be married, may apply to the governor and company of the Bank of England, or to the governor and company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, and not being less than twenty pounds, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to or made to stand in the books of the governor and company to whom such application is made in the name or intended name of the woman as a married

As to a married woman's property in the funds.

woman entitled to her separate use, and on such sum being entered in the books of the said governor and company accordingly the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman; provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband.

As to a married woman's property in a joint stock company.

4. Any married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint stock company that any fully paid up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman; provided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section nine of this Act, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

As to a married woman's property in a society.

5. Any married woman, or any woman about to be married, may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society, duly registered, certified, or enrolled under the Acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim shall be deemed to be the separate property of such woman, and shall be transferable and payable with all dividends and profits thereon as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of

her husband without his consent, the Court may, upon an application under section nine of this Act, order the same and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

6. Nothing hereinbefore contained in reference to moneys deposited in or annuities granted by savings banks or moneys invested in the funds or in shares or stock of any company shall as against creditors of the husband give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this Act had not passed.

Deposit of moneys in fraud of creditors invalid.

7. Where any woman married after the passing of this Act shall during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.

Personal property not exceeding 200*l.* coming to a married woman to be her own.

8. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.

Freehold property coming to a married woman, rents and profits only to be her own.

9. In any question between husband and wife as to property declared by this Act to be the separate property of the wife, either party may apply by summons or motion in a summary way either to the Court of Chancery in England or Ireland according as such property is in England or Ireland, or in England (irrespective of the value of the property) the judge of the county court of the district in which either party resides, and thereupon the judge may make such order, direct such inquiry, and award such costs, as he shall think fit; provided that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit or on an equitable plaint would have been, and the judge may, if either party so require, hear the application in his private room.

How questions as to ownership of property to be settled.

10. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

Married woman may effect policy of insurance.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them,

As to insurance of a husband for benefit of his wife.

shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the Civil Bill Court of the division of the county, in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

Married women may maintain an action.

11. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, moneys, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property.

Husband not to be liable on his wife's contracts before marriage.

12. A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried.

Married woman to be liable to the parish for the maintenance of her husband.

13. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband as by the thirty-third section of "The Poor Law Amendment Act, 1868," they may now make and enforce against a husband for the maintenance of his wife who becomes chargeable to any union or parish. Where in

Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by such and the same actions and proceedings as money lent.

14. A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children: Provided always, that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children.

15. This act shall come into operation at the time of the passing of this Act.

16. This Act shall not extend to Scotland.

17. This Act may be cited as the "Married Women's Property Act, 1870."

Married woman to be liable to the parish for the maintenance of her children.
Commencement of act.
Act not to extend to Scotland.
Short title.

37 & 38 VICT. c. 50.

An Act to amend the Married Women's Property Act (1870).
[30th July, 1874.]

WHEREAS it is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment:

Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt.

Husband and wife may be jointly sued for her debts before marriage.

2. The husband shall, in any action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified;

Extent to which husband liable.

or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned.

If husband without assets, he shall have judgment for costs.

3. If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife.

Joint and separate judgment against husband and wife for debt.

4. When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife.

Assets for which husband liable.

5. The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows:

- (1.) The value of the personal estate in possession of the wife, which shall have vested in the husband:
- (2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession:
- (3.) The value of the chattels real of the wife which shall have vested in the husband and wife:
- (4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received:
- (5.) The value of the husband's estate or interest in any property real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person:
- (6.) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors:

Provided that when the husband after marriage pays any debt of his wife, or has a judgment *bonâ fide* recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable.

Extent of act.
Short title.

6. This Act shall not extend to Scotland.

7. This Act may be cited as the "Married Women's Property Act (1870) Amendment Act, 1874."

II.—RULES, FORMS, AND FEES IN THE COURT OF PROBATE.

*RULES and Orders for Her Majesty's Court of Probate,
made 30th July, 1862, under the Provisions of the
Statutes 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95,
in respect of*

CONTENTIOUS BUSINESS.

1. All rules and orders heretofore made and issued in respect of **Contentious** business shall be repealed on and after the first day of September, 1862, except so far as concerns any matters or things done in accordance with them prior to the said day.

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Business.

2. The following rules and orders in respect of contentious business shall take effect on and after the first day of September, 1862.

CONTENTIOUS BUSINESS.

3. All proceedings in the Court of Probate or in the registries thereof in respect of business not included in the "Court of Probate Act, 1857," under the expression "Common Form business," except the warning of caveats, shall be deemed to be contentious business.

Parties to Causes.

4. Executors or other parties who, previously to the passing of the "Court of Probate Act, 1857," might prove wills in solemn form of law, shall be at liberty to prove wills under similar circumstances, and with the same privileges, liabilities, and effect, as heretofore.

5. Next of kin and others who, previously to the passing of the said Act, had a right to put executors or parties entitled to administration with will annexed upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs, as heretofore.

6. Parties who previously to the passing of the said Act had a right to intervene in a cause may do so, with leave of

Contentious
Business.

the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore.

Caveats.

7. Caveats may be entered in the principal registry of the Court of Probate, or in a district registry thereof; if in the principal registry, the person entering the caveat must insert the name of the deceased in the index to the Caveat Book.

8. A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months, and then expire and be of no effect, but may be renewed from time to time.

9. Caveats shall be warned from the principal registry. The warning is to be served by leaving the same or a true copy thereof at the place mentioned in the caveat as the address of the person who entered it.

10. It shall be sufficient for the warning of a caveat that a registrar send by the public post a warning signed by himself, and directed to the person who entered it, at the address mentioned in it.

11. The warning to a caveat is to state the name and interest of the party on whose behalf the same is issued, and if such person claims under a will or codicil, is also to state the date of such will or codicil, and must be accompanied by an address within three miles of the General Post Office at which any notice requiring service may be left. The form of warning will be supplied in the registry.

12. Upon an appearance being entered in answer to the warning of a caveat, the matter shall be entered as a cause in the court book, and the contentious business shall thereupon be held to commence, and the expenses of the entry of such caveat and the warning thereof shall, upon taxation, be considered as costs in the cause.

Citations.

13. Citations can only be extracted from the principal registry, and no citation is to issue under seal until an affidavit in verification of the averments it contains has been filed in the registry.

14. When a party proposes to prove a will or codicil in solemn form of law, and no caveat has been entered, or a caveat has been entered and no appearance given to the warning thereof, the contentious business shall be held to commence with the extracting of a citation in the Forms Nos. 1 and 2, or in some similar form.

15. Before a citation is signed by the registrar a caveat shall be entered against any grant being made in respect of the estate and effects of the deceased to which such citation

relates, and notice thereof shall be sent to the registrar of any district in which the deceased appears to have had a residence at the time of his death. Such caveat is to be renewed from time to time, so as to be kept in force so long as the proceedings arising from the service of the citation are pending. This rule is not to apply to citations to exhibit an inventory, and to render an account, nor to citations to show cause why a bond should not be assigned in order to its being enforced against the sureties.

16. Citations to see proceedings may be extracted from the registry, on the application of any party to the cause. A form is given, No. 4.

17. Every citation shall be written or printed on parchment, and the party extracting the same, or his proctor, solicitor, or attorney, shall take it, together with a præcipe, a form of which is given, marked No. 5, to the registry, and there deposit the præcipe, and get the citation signed and sealed. The address given in the præcipe must be within three miles of the General Post Office.

18. Citations are to be served personally when that can be done, the party cited being resident in Great Britain or Ireland, but if personal service cannot be effected the direction of the judge or registrars as to the mode of service must be obtained. Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing such party the original, if required by him so to do.

19. Citations may be served upon parties resident out of Great Britain and Ireland by the insertion of the same or of an abstract thereof, settled and signed by one of the registrars, as an advertisement, in such of the morning and evening London newspapers, and if necessary in such local newspapers, and at such intervals as the judge or a registrar may direct: provided that in any case the judge or a registrar may direct a citation to be served personally. If the party cited be abroad, having an agent resident in England, such agent must be served with a true copy of the citation.

20. Before a party can proceed after the service of a citation, an appearance must have been entered by or on behalf of the party cited, or an affidavit of personal service, and of non-appearance, must, together with the citation, have been filed in the registry, or if personal service has not been duly effected, the order of the judge, or of one of the registrars in his absence, founded on an affidavit, and giving leave to proceed, must have been obtained. In case the citation has been advertised, the newspapers containing the advertisement, together with the citation and an affidavit of non-appearance, must be filed in the registry.

21. The above rules, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service.

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Business.

22. If contentious proceedings arise from the service of a citation, the expense of the citation and service thereof shall, upon taxation, be considered as costs in the cause.

Suits in Formá Pauperis.

23. Any person desirous of prosecuting a suit *in formá pauperis* is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.

24. No person shall be admitted to prosecute a suit *in formá pauperis* without the order of the judge: and to obtain such order, the case laid before counsel, and his opinion thereon, with an affidavit of the party, or of his or her proctor, solicitor, or attorney that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit by the party applying that he or she is not worth 25*l.* after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

25. Where a pauper omits to proceed to trial, pursuant to notice, he or she may be called upon by summons to show cause why he or she should not pay costs, though he or she has not been dispaupered, and why all future proceedings should not be stayed until such costs are paid.

Appearances.

26. All appearances are to be entered in the principal registry in a book provided for the purpose, and kept by the clerk of the papers. The entry must set forth the interest which the person on whose behalf it is entered has in the estate and effects of the deceased.

27. The entry of the appearance of a party shall be accompanied by an address within three miles of the general post-office.

Service of Pleadings, &c.

28. It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and orders, at the address furnished as aforesaid by the plaintiff and defendant respectively.

Default.

29. In case the party cited does not appear within the time limited in the citation, the cause shall proceed in default; nevertheless the party cited may enter an appearance at any time before a proceeding has been taken in default, or afterwards by leave of the judge or of one of the registrars.

Affidavits as to Scripts.

30. In testamentary causes the plaintiff and defendant, within eight days of the entry of an appearance on the part of the defendant, are respectively to file their affidavits as to

scripts, whether they have or have not any script in their possession. A Form, No. 10, is given.

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31. Every script which has at any time been made by or under the direction of the testator, whether a will, codicil, draft of a will or codicil, or written instructions for the same, of which the deponent has any knowledge, is to be specified in his affidavit of scripts; and every script in the custody or under the control of the party making the affidavit is to be annexed thereto, and deposited therewith in the registry.

32. No party to the cause, nor his proctor, solicitor, or attorney, shall be at liberty, except by leave of the judge, or of one of the registrars of the principal registry, to inspect the affidavit as to scripts, or the scripts annexed thereto, filed by any other party to the cause, until his own affidavit as to scripts shall have been filed.

The Declaration.

33. In ordinary cases it belongs to the plaintiff to deliver the declaration, and to the defendant to deliver the plea; but the party propounding the alleged last will and testament of the deceased shall, in all cases, even if defendant in the suit, deliver the declaration, and the party opposing the same deliver the plea.

34. The declaration is to be delivered to the opposite party, and a copy thereof filed in the registry on one and the same day, and within one month from the entry of appearance by the defendant; but the party whose duty it is to bring in the declaration shall not be compelled to deliver it, or to file a copy thereof, until the expiration of eight days after the other party has filed his affidavit as to scripts.

35. In case of proving a will in solemn form of law, the party whose duty it is shall declare in the Form No. 6, or as near thereto as the circumstances of the case admit.

36. In case of proceedings in default, the plaintiff shall file his declaration in the registry within eight days from the last day allowed in the citation for the appearance of the defendant.

Interest of Party opposing Will.

37. In a testamentary cause after delivery of the declaration the interest of the party to whom it has been delivered cannot be disputed by the party declaring, except by leave of the judge.

The Plea.

38. A party desirous of pleading, must deliver his plea to the other party within eight days after the service of the declaration, and file a copy thereof in the registry on one and the same day, otherwise he will not be permitted to plead,

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Business.

except with the permission of the judge, or of the registrars of the principal registry in the absence of the judge. A Form of Plea is given, No. 8.

Further Pleadings.

39. Either of the parties may, within eight days of the service upon him of the last previous pleading, give in a replication, rejoinder, sur-rejoinder, rebutter, or demurrer, as he may be advised. The form of the declaration and plea will, it is presumed, be a sufficient guide as to the form of any further pleadings.

General Rules as to Pleadings.

Annulled by
amended and
additional
rules and
orders, Dec.
29, 1865. See
post, p. 408.

40. If one party propound a will in his declaration, and the other party in his plea allege the existence of another will, each party may with and subject to the permission of the judge, adduce proof at the trial or hearing of the cause of the validity of the will upon which he relies.

41. In all cases the party opposing a will may, with his plea, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Prerogative Court.

42. Either party desiring to alter or amend a pleading must apply to the Court upon motion; but if the alteration or amendment required be merely verbal or in the nature of a clerical error it may be made by order upon summons.

43. When a pleading has been ordered to be altered or amended, the time for filing the next pleading shall commence from the time of the order having been complied with.

44. If a party in any cause fail to deliver, or file a copy of the declaration, plea, or other pleading within the time specified in these rules, or within such extended time as may have been allowed, the party to whom such declaration, plea, or other pleading ought to have been delivered shall not be bound to receive it, and the copy of such declaration, plea, or other pleading shall not be filed, unless by direction of the judge, or by order of the registrars of the principal registry, obtained on summons. The expense of every application for such direction or order shall fall on the party who has caused the delay, unless the judge or registrars shall otherwise direct.

45. When in any cause a conditional order is made, the party entitled to proceed in default must, before he can take the next step, obtain an order of the registrars, or, if required, an order of the judge upon summons, or on motion, in Court.

*The Issue.*Contentious
Business.

46. Within fourteen days after the delivery of the last pleading in the cause, the party who brought in the declaration is to deliver to the other parties in the cause the issue in the Form No. 11, or in a form as near thereto as the circumstances of the case will admit, but the issue is not to be filed.

The Mode of Trial.

47. The party who delivers the issue shall therewith give notice to the other parties to the cause, that, after the expiration of eight days, he intends on a day to be specified in the notice to apply to the Court to try the questions at issue before itself, either with or without a jury, or to direct an issue to be tried before a judge of assize, as the case may be; and if he do not give such notice with the issue, or within sixteen days from the day on which the issue was delivered, the other party may give a similar notice to him. A Form of Notice, No. 12, is subjoined.

48. A copy of every such notice shall be filed in the registry with the case for motion as to mode of trial.

49. In each case the judge shall, after hearing the parties upon motion in Court, direct in what mode the cause shall be tried or heard.

The Record.

50. After the direction of the judge has been obtained as to the mode in which the cause is to be tried or heard, the party who delivered the declaration shall, within eight days, deposit the record of the cause in the registry. The record is to conclude with a statement of the mode in which the judge has directed the cause to be tried or heard, as in the Form No. 13.

51. In default of the appearance of defendants, being parties cited, a record, as in Form No. 14, or as near thereto as can be, shall be deposited in the registry.

Trial by Jury.

52. If the cause be directed to be tried by a jury, the questions at issue between the parties are to be prepared by the party declaring from the record, and settled by one of the registrars of the principal registry. A form is given, No. 15, and a copy of such questions so settled is to be served on all the other parties to the cause.

53. After the questions have been so settled, any party in the cause shall be at liberty to apply to the judge on summons to alter or amend the same, and his decision shall be final and binding on the parties.

Contentious
Business.*Setting down the Cause for Trial or Hearing.*

54. The party who has deposited the record shall set down the cause for trial or hearing, and upon the day on which he so sets it down shall give notice of his having done so to each party for whom an appearance has been entered; but if he delay setting down the cause for trial or hearing for the space of one month after the Court has directed the mode in which the questions at issue shall be tried or heard, either of the other parties may set the cause down for trial or hearing, and give a similar notice. A copy of every such notice shall be filed in the registry; and the cause, unless the judge shall otherwise direct, shall come on in its turn.

55. No cause is to be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the written consent of all parties to the suit, previously filed in the registry.

Demurrer.

56. All demurrers are to be set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the judge without a jury.

The Hearing.

57. The hearing of the cause shall be conducted in Court, and the counsel shall address the Court, subject to the same rules and regulations as now obtain in the Courts of Common Law.

58. After the conclusion of the trial or hearing, the registrar shall enter on the record the finding of the jury, or the decision of the judge, in a form corresponding as near as may be with those given, Nos. 25 and 26, and shall sign the same.

New Trial.

59. An application for a new trial of an issue tried before a jury may be made to the Court by motion within fourteen days from the day on which the issue was tried if the Court be then sitting, if not, on the first motion day after the expiration of the fourteen days.

60. An application for a rehearing of a cause heard before the judge without a jury, and in which evidence has been given *vivâ voce*, may be made by motion within fourteen days from the day on which the same was heard, if the Court be then sitting; if not, on the first motion day after the expiration of the fourteen days.

Interest Causes.

61. In interest causes, as heretofore, each party shall be at liberty to deny the interest of the other; and in such cases

both parties may, with and subject to the permission of the judge, adduce proof on one and the same trial of their interests respectively.

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62. In interest causes the pleading of each party must show on the face of it that no other person exists having a prior interest to that of the claimant.

63. Forms of the declaration and plea in an interest cause are given, No. 7, and No. 9.

Proceedings by Petition.

64. Any question arising in a cause, and not being one of interest, domicile, or other matter usually brought before the Court by declaration and plea, may be brought before the Court by petition.

65. The party desiring to proceed by petition is to give notice thereof in writing to all the other parties in the cause, and such notice is to set forth the question intended to be raised for the decision of the Court, and a copy of such notice is to be filed in the registry.

66. In proceedings by petition the plaintiff shall, within eight days after he has given notice, deliver his petition to the defendant, and file a copy thereof in the registry upon one and the same day.

67. The defendant shall, within eight days after the delivery of the petition, deliver his answer to the plaintiff, and file a copy thereof in the registry upon one and the same day; and the same course shall be pursued with respect to the reply, rejoinder, &c. until the petition is concluded.

68. When the defendant raises the question to be heard by petition, and gives notice thereof to the plaintiff, the plaintiff shall, within eight days from the receipt of such notice, file a petition; otherwise the defendant shall be at liberty to do so.

69. Both plaintiff and defendant shall, within eight days from the day upon which the petition is concluded, file in the registry such affidavits and other proofs as may be necessary in support of their several averments therein. A Form of Petition is given, No. 28.

70. After the time for filing the affidavits and other proofs has expired, the petitioner is to set down the petition for hearing in the same manner as a cause.

Subpœnas.

71. Every subpœna shall be written or printed on parchment, and may include the names of any number of witnesses. The party, or his proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there get it signed and sealed, and deposit the præcipe. Forms are given, Nos. 16, 17, 18, and 19.

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Admission of Documents.

72. Any party in a cause may call upon the other party or parties, by notice in writing in the form given, No. 20, to admit any document, saving any just exceptions; and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial or hearing the judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed as costs in the cause except in cases where the omission to give the notice was, in the opinion of the registrar, a saving of expense.

Production of Wills, &c.

73. Applications for an order for the production of papers or writings purporting to be testamentary, may be made to the judge, by motion or by summons when a suit is pending, and by motion upon affidavit when no suit is pending. If it can be shown that a testamentary paper is in the possession, within the power, or under the control of any person, a subpœna for the production of the same may be obtained by a registrar's order, founded on an affidavit. Forms of subpœnas applicable to these cases are given, Nos. 21 and 22, and Forms of Præcipe, Nos. 23 and 24.

Guardians to Minors.

74. A minor may elect a guardian for the purpose of carrying on, defending, or intervening in a suit, in the same manner and subject to the same rules as in respect of non-contentious business, and without having such guardian assigned to him; but guardians are to be assigned to infants (under the age of seven years) for the above purposes by the judge, or by an order of one of the registrars, founded on an affidavit to the effect required for such assignment in non-contentious business.

Pencil writing on Will, &c.

75. When any pencil writing appears on a will, script, or other document filed in the registry, a fac-simile copy of the will, script, or other document, or of the pages or sheets thereof, containing the pencil writing, must also be filed with those portions written in red ink which appear in pencil in the original. Such copy must be examined by an examiner in the registry.

Inventories.

76. In contentious business, inventories, and not merely declarations of the personal estate and effects of the deceased, are to be filed, unless by order of the judge or of a registrar. The Form of Inventory is given, No. 27.

*Notices.*Contentious
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77. All notices required by these rules, or by the practice of the Court, are to be in writing.

Real Estate.

78. Any person proceeding to prove a will in solemn form, or to revoke the probate of a will, may, if the will affects real estate, apply to the judge, or to a registrar in his absence, for an order authorizing him to cite the heir or heirs at law or other person or persons having or pretending interest in such real estate to see proceedings; and the judge or registrar, on being satisfied by affidavit that the will in question does affect or purport to affect the real estate, will make an order authorizing the person applying to cite the heir or heirs at law or other such person or persons as aforesaid: provided always, that the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires.

Receiver of Real Estate.

79. A receiver of real estate pending suit is to give bond in the form given, No. 29, or in a form as near thereto as the circumstances of the case will admit of, with two sureties, and in a penalty of such an amount as may be directed by the judge.

Affidavits.

80. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every person making an affidavit is to be inserted therein.

81. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

82. No affidavit will be admitted in any matter depending in the Court of Probate any material part of which is written on an erasure, or in the jurat of which there is any interlineation or erasure.

83. When an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other person before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also that such party made his or her mark thereto, or wrote his or her signature thereto, in the presence of the registrar, commissioner, or other person before whom the affidavit was made.

84. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before the partner or clerk of his proctor, solicitor, or attorney.

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85. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

86. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used in Court, unless by leave of the judge.

Appeals.

87. Application for leave to appeal against any interlocutory decree or order of the Court of Probate, must be made within a month of the delivery of the decree or order appealed from, or within such extended time as the judge shall direct, and notice of such application must be given to the party in whose favour such order or decree has been made, and filed in the registry. A Form of Notice is given, No. 29.

88. Parties may proceed to carry into effect the decision of the Court of Probate, notwithstanding any notice of appeal, or of application for leave to appeal, unless the judge shall otherwise order; and the judge may order the execution of his decree or order to be suspended, upon such terms as he sees fit.

Time fixed by these Rules.

89. The judge shall in every case in which a time is fixed by these rules for the performance of any act have power to extend the same to such time, and with such qualifications and restrictions, and on such terms, as to him may seem fit.

90. To prevent the time fixed for the performance of any act from expiring before application can be made to the judge for an extension thereof, any one of the registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day upon which the judge shall next sit in chambers, or in Court to hear motions.

91. The time fixed in these rules for bringing in pleadings and for other proceedings shall in all cases be exclusive of Sundays, Christmas-day, and Good Friday.

Taxing Bills of Costs.

92. All bills of costs in contentious business are referred to the registrars of the principal registry for taxation, and may be taxed by them without any special order for that purpose. Such bills are (unless by leave of the judge or a registrar) to be filed in the registry two days at least before the day appointed for the taxation. An appointment for taxation will be made at the time of filing the bill.

93. The party who has obtained an appointment to tax his bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at the same time deliver to him or them a copy of the bill to be taxed.

94. When an appointment has been made by a registrar of the principal registry for taxing any bill of costs, and any of the parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill, after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.

95. If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill.

Accounts of Administrators and Receivers pending Suit.

96. Every administrator pendente lite and receiver of real estate shall exhibit an inventory and render an account of the property of the deceased which comes to his hands, and the accounts of every such administrator and receiver shall be referred to the registrars of the principal registry for investigation and report, before the same are allowed by the Court, unless the judge shall otherwise direct; and the foregoing rules and orders respecting the taxation of costs shall, so far as the same are applicable, be observed with respect to the investigation of such accounts, and any other accounts referred to the registrars for examination.

Paying Money out of Court.

97. Persons applying for payment of money out of the registry must give forty-eight hours' notice of such application to the clerk of the papers. Such notice is to be in writing, and to set forth the day on which the money applied for was paid into the registry—the minute entered on receiving the same—the date and particulars of the order for payment to the applicant—and if the same be in payment of costs, the date of filing the bill for taxation and of the registrar's certificate. During the summer vacation money can only be paid out on certain days, to be fixed by the registrars, notice whereof will be given in the registry.

SUMMONSES.

98. A summons may be taken out by any person in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding.

99. A printed form must be obtained and filled up with the object of the summons, and a proper fee stamp affixed. It must then be taken to the clerk of the papers, who will insert in the blank left in the printed form the time when the summons is to be made returnable, and get the summons signed by a registrar.

100. The clerk of the papers is then to enter the name of the cause or matter and of the agent taking out the summons

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in the summons book, and return the summons (with the stamp cancelled), signed, to the applicant, who is to serve a copy on the party summoned. This copy must be served on the party summoned one clear day at least before the summons is returnable, and before 7 p.m. On Saturdays the copy of the summons is to be served before 2 p.m.

101. On the day and at the hour named in the summons the party issuing the same is to present himself with the original at the judge's chambers.

102. Both parties will be heard by the judge, who will make such order as he may think fit, and a note of such order will be made by the registrar in the summons book.

103. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the judge, who will thereupon make such order as he may think fit.

104. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the judge on that occasion.

105. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the opposite party, must be filed in the registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy. The clerk of the papers before giving out the order is to see that the proper stamp has been affixed to it, and is to cancel such stamp.

106. If a summons is brought to the clerk of the papers, with a consent to an order endorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the judge: provided that the order sought is in the opinion of the registrars one which, under the circumstances, would be made by the judge.

AMENDED RULES AND ORDERS.

Issued the 29th day of December, 1865.

In place of Rule 40 of the Rules and Orders in Contentious Business, and of the Form No. 8 referred to in Rule 38 of the said Rules and Orders, it is ordered, that—

40. If one party propounds a will or testamentary script in his declaration, and the adverse parties, or either of them, desire to propound another will or testamentary script, the adverse parties must, with their pleas, deliver to the opposite party and file in the registry a declaration propounding such

other will or testamentary script, to which the opposite party shall plead; and the form of declaration, and the pleadings and proceedings arising therefrom, shall be the same as are directed by the Rules and Orders of this Court in respect to the original declaration delivered and filed in the cause.

40a. The party or parties pleading to a declaration propounding a will or testamentary script shall be allowed to plead only the pleas hereunder set forth, unless by leave of the judge, to be obtained on summons.

1. That the paper writing bearing date, &c. and alleged by the plaintiff [*or* defendant] to be the last will and testament [*or* codicil to the last will and testament] of A. B., late of, &c., deceased, was not duly executed according to the provisions of the Statute 1 Vict. c. 26, in manner and form as alleged.
2. That A. B. the deceased in this cause, at the time his alleged will [*or* codicil] bears date, to wit, on the, &c., was not of sound mind, memory, and understanding.
3. That the execution of the said alleged will [*or* codicil] was obtained by the undue influence of C. D. and others acting with him.
4. That the execution of the said alleged will [*or* codicil] was obtained by the fraud of C. D. and others acting with him.
5. That the deceased at the time of the execution of the said alleged will [*or* codicil] did not know and approve of the contents thereof.

Any party pleading the last of the above pleas shall therewith (unless otherwise ordered by the judge) deliver to the adverse parties and file in the registry particulars in writing, stating shortly the substance of the case he intends to set up thereunder; and no defence shall be available thereunder which might have been raised under any other of the said pleas, unless such other plea be pleaded therewith.

ADDITIONAL RULES AND ORDERS.

Writs of Attachment and other Writs.

107. Applications for writs of attachment, and also for writs of fieri facias and of sequestration, must be made to the judge by motion in Court.

108. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the registry, with an office copy of the order, and, when approved and signed by one of the registrars, shall be sealed with the seal of the court, and it shall not be necessary for the judge to sign such writs.

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109. Any person in custody under a writ of attachment may apply for his or her discharge to the judge if the Court be then sitting; and if not, then to one of the registrars, who for good cause shown shall have power to order such discharge.

ADDITIONAL RULES AND ORDERS.

Issued the 2nd day of March, 1874.

Service of Notices, &c.

110. It shall be sufficient to leave all notices and copies of pleadings and other instruments which by the rules and orders of the Court are required to be given or delivered to the opposite parties in a cause, or to their proctors, solicitors, or attorneys, and personal service of which is not expressly required, at the address furnished, by such parties respectively.

111. When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the other parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the judge, or of the registrars in his absence.

112. If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded, on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the judge shall otherwise direct.

113. When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the commissioner or other person before whom the affidavit is sworn.

Change of Proctor, Solicitor, or Attorney.

114. A party may obtain an order to change his or her proctor, solicitor, or attorney upon application by summons to the judge, or to the registrars in his absence.

115. In case the former proctor, solicitor, or attorney neglects to file his bill of costs for taxation at the time required by the order served upon him, the party may, with the sanction and by order of the judge or of the registrars, proceed in the cause by the new proctor, solicitor, or attorney, without previous payment of such costs.

*Order for the immediate Examination of a Witness.*Contentious
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116. Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the judge, or to one of the registrars in his absence, by summons, or if on behalf of a plaintiff proceeding in default of appearance of the parties cited or warned in the cause without summons before one of the registrars, who will direct the order to issue, or refer the application to the judge, as he may think fit.

117. Such witness shall be examined *vivâ voce*, unless otherwise directed, before a person to be agreed upon by the parties in the cause, or to be nominated by the judge or by the registrar to whom the application for the order is made.

118. The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days' notice of the time and place appointed for the examination, unless the judge or the registrar to whom the application is made for the order shall direct a shorter notice to be given.

Commissions and Requisitions for Examination of Witnesses.

119. Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a plaintiff proceeding in default of appearance without summons, before one of the registrars, who will order such commission or requisition to issue, or refer the application to the judge, as he may think fit.

120. A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause, and approved of by one of the registrars, or for want of agreement to be nominated by the registrar to whom the application is made.

121. The commission or requisition is to be drawn up and prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the registrar shall make an order on such application, or refer the matter to the judge. Form of a commission and requisition is given in the Appendix No. 31.

122. Any of the parties to the cause may apply to one of the registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the registrar to whom the application is made may direct the necessary alterations to be made in the commission or requi-

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sition for that purpose, and settle the same, or refer the application to the judge.

123. After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the registrars.

Cases for Motion.

124. Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded.

125. If the cases tendered are deficient in any of the above particulars, the same shall not be received in the registry without permission of one of the registrars.

126. On depositing the case in the registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the registry; or in case such affidavits or documents have been already filed or deposited in the registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the judge.

127. Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the other parties to the suit who are entitled to be heard in opposition thereto.

As to Costs.

128. In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor, solicitor or attorney of the party to whom such costs are to be paid may forthwith file his bill of costs in the registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for moving for a new trial or re-hearing shall have expired; or, in case a rule *nisi* should have been granted, until the rule is disposed of, unless the judge shall, for cause shown, direct a more speedy taxation.

Review of Taxation.

129. Application for a review of taxation is to be made to the judge on summons.

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130. Upon the registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the amount within seven days, unless a summons be taken out for a review of the taxation, in which case the order for payment shall be suspended until the summons is disposed of.

131. This order shall be served on the proctor, solicitor, or attorney of the party liable [or if it is desired to enforce the order by committal on the party himself], and if the costs be not paid within the seven days a writ of *fiery facias* or writ of sequestration or a writ of *elegit* shall be issued as of course in the registry, upon an affidavit of service of the order, and nonpayment.

As to Subpœnas.

132. The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness. Such subpœna shall be in the following form: [See No. 16.]

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FORMS which are to be followed as nearly as the circumstances of each case will allow.

No. 1.—Citation to see Will proved.

In her Majesty's Court of Probate.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of in the county of .

This affidavit must be made by the plaintiffs or one of them.

Whereas it appears by an affidavit of A. B. of sworn on and filed in the principal registry of our Court of Probate, that the said A. B., of , claiming to be the executor of C. D., late of deceased, who died on or about the day of 18 at intends to prove in solemn form of law as well the alleged last will and testament of the said deceased bearing date the day of as also the [first] codicil thereto, bearing date the day of [and so on for any other codicils], and that the said deceased died a bachelor without parent [or as the case may be], and that you the said are the natural and lawful and only next of kin of the said deceased, and the only person entitled to his personal estate and effects [or as the case may be] in case he be pronounced to have died intestate: NOW THIS IS TO COMMAND YOU THE SAID that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the principal registry of our Court of Probate in support of any interest you may have in the personal estate and effects of the said deceased: AND TAKE NOTICE, that in default of your so doing the judge of our said court will proceed to hear the said will (and codicils) proved in solemn form of law, and to pronounce sentence in regard to the validity of the same, your absence notwithstanding.

Dated this day of 18 and in the year of our reign.
(Signed) E. F., registrar.

Citation to see will proved.

[None of practitioner.]

Indorsement to be made after service.

This citation was served by G. H. on the within-named of at on the day of 18 .
(Signed) G. H.

No. 2.—Citation to bring in Probate.

In her Majesty's Court of Probate.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of in the county of .

This affidavit must be made by the plaintiffs or one of them.

Whereas it appears by an affidavit of C. D. of sworn on and filed in the principal registry of our Court of Probate, that probate of the alleged last will and testament [with codicils thereto] of A. B., late of deceased, was on or about the day of 18 granted to you by our Court of Probate [or at the district registry attached to our Court of Probate at]: and that the said deceased

died a bachelor without parent [*or as the case may be*], and that the said C. D. is one of the natural and lawful brothers and next of kin of the said deceased, and one of the persons entitled in distribution to his personal estate and effects in case he shall be pronounced to have died intestate [*or interested under a former will bearing date, &c., or as the case may be*], and that the said probate ought to be called in, revoked, and declared null and void in law: NOW THIS IS TO COMMAND YOU, the said _____ that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the principal registry of our said court the aforesaid probate, and further do show cause (if you should think it for your interest so to do) why the said probate should not be revoked and declared null and void in law, and the said will [and codicils] pronounced to be null and invalid.

Contentious Business.

Dated this day of 18 and in the year of our reign.
(Signed) E. F., registrar.

Citation to bring in probate.

[Name of the practitioner.]

Indorsement to be made after service.

This citation was served by G. H. on the within-named of
at on the day of 18 . (Signed) G. H.

No. 3.—Citation to bring in Administration.

In her Majesty's Court of Probate.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To _____ of _____ in the county of _____

Whereas it appears by an affidavit of A. B., of _____ sworn on _____ and filed in the principal registry of our Court of Probate, that C. D., late of _____ deceased, died on _____ at _____, and that on the _____ letters of administration of the personal estate and effects of the said deceased, on the suggestion that he had died intestate, were granted to you by the authority of our Court of Probate as the _____ and next of kin of the said deceased, and that it has since been discovered that the said C. D. made and duly executed his last will and testament, dated _____, and thereof appointed _____ executors [*or as the case may be*], and that the said letters of administration ought to be called in, revoked and declared null and void in law: Now THIS IS TO COMMAND YOU, the said _____ that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the principal registry of our said court the said letters of administration, and further do show cause (if you should think it for your interest so to do) why the same should not be revoked and declared null and void.

This affidavit must be made by the plaintiffs or one of them.

Dated this day of 18 and in the year of our reign.
(Signed) E. F., registrar.

Citation to bring in administration.

[Name of practitioner.]

Indorsement to be made after service.

This citation was served by G. H. on the within-named of
at on the day of 18 . (Signed) G. H.

Contentious
Business.

No. 4.—Citation to see Proceedings.

In her Majesty's Court of Probate.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of in the county of .

This affidavit must be made by the party on whose behalf the citation is extracted.

If heir-at-law recite briefly the order on motion.

Whereas it appears by an affidavit of sworn on the day of 18 , and filed in the principal registry of our Court of Probate, that there is now depending in our said Court a cause entitled A. B. v. C. D., wherein the said is proceeding to prove in solemn form of law the alleged last will and testament with codicils thereto, of E. F., late of deceased, who died on or about the day of at .

And whereas it appears by the said affidavit that you are the natural and lawful and one of the next of kin of the deceased, and a party entitled in distribution to the personal estate and effects of the deceased in case he should be pronounced to have died intestate [*or interested under a former will of the said deceased, bearing date, &c., or as the case may be*]. Now THIS IS TO GIVE NOTICE TO YOU THE SAID to appear in the said cause, either personally or by your proctor, solicitor, or attorney, should you think it for your interest so to do, at any time during the dependence of the said cause, and before final judgment shall be given therein: AND TAKE NOTICE, that in default of your so doing the judge of our said Court of Probate will proceed to hear the said will [*and codicils*] proved in solemn form of law, and pronounce judgment in the said cause, your absence notwithstanding.

Dated this day of and in the year of our reign.

(Signed) E. F., Registrar.

Citation to see Proceedings.

Name of the Practitioner.

Indorsement to be made after service.

This citation was served by G. H. on of at on the day of 18 .

(Signed) G. H.

No. 5.—Præcipe for Citation.

In her Majesty's Court of Probate.

Citation [*or citation to see proceedings*] for A. B. against C. D., in a matter of proving in solemn form of law the last will and testament with codicils of E. F., late of in the county of, &c., deceased [*or generally describing the nature of the suit*].

P. A., proctor, solicitor, or attorney for [*or A. B. in person*]. [*Add an address within three miles of the General Post Office.*]

The day of 18 .

No. 6.—Declaration.

In her Majesty's Court of Probate.

The day of 18 .
A. B. [*or A. B.*, by C. D., his proctor, solicitor, or attorney,] saith, that E. F., late of deceased, who died on or about the day of at being of the age of twenty-one years and upwards, made his last will and testament, with codicils thereto, bearing date, to

wit, the said will on the day of 18 , the first of the said codicils, on the day of 18 , [and so on for any other codicils,] and in the said will appointed the said A. B. sole executor [or as the case may be]; that the said will and codicils respectively, after having been reduced into writing, were signed by the said testator [or signed by G. H. in the presence and by direction of the testator, or signed by the testator who acknowledged his signature thereto, or as the case may be,] in the presence of two witnesses present at the same time, and who subscribed the same in the presence of the said testator, and whose names severally appear upon the said will and codicils; and that the said testator was at the time of the execution of the said will and codicils respectively of perfect sound mind, memory, and understanding.

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Notice where the Defendant appears.

The defendant must plead hereto in eight days from the date hereof, otherwise the plaintiff will proceed to obtain probate of the said will and codicils [or as the case may be].

No. 7.—Declaration in an Interest Cause.

In her Majesty's Court of Probate.

The day of 18 .
A. B. [or A. B. by C. D., his proctor, solicitor, or attorney,] saith, that E. F., late of deceased, died on or about the day of 18 , at intestate [or as the case may be], a widower, without child, parent, brother or sister, uncle or aunt, nephew or niece, leaving the said A. B. his lawful cousin german and one of his next of kin [or as the case may be].

Notice.

The defendant must plead hereto in eight days from the date hereof, otherwise the plaintiff will proceed to obtain letters of administration of the personal estate and effects of the said deceased [or as the case may be].

No. 8.—Plea.

In her Majesty's Court of Probate.

The day of 18 .
G. H. [or G. H. by I. Z., his proctor, solicitor, or attorney,] saith, that the paper writing bearing date the day of 18 , and alleged by the plaintiff to be the last will and testament of A. B., late of in the county of deceased [or the first or any other codicil thereto], was not executed according to the provisions of 1 Viet. c. 26 [or that A. B. the deceased in this cause at the time his alleged will [or codicil] bears date, to wit, on the day of 18 , was not of sound mind, memory, and understanding,] [or any other averment in opposition to the will or codicil propounded].

No. 9.—Plea in an Interest Cause.

In her Majesty's Court of Probate.

The day of 18 .
G. H. [or G. H. by I. K., his proctor, solicitor, or attorney,] saith, that A. B., the plaintiff, is not the lawful cousin german of E. F., who died on or about the day of 18 , at the deceased in
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this cause. And further, that the said deceased died intestate [*or as the case may be*], a widower, without child, parent, brother or sister, uncle or aunt, nephew or niece, or cousin german, leaving him the said G. H. his lawful cousin german once removed, and his only next of kin [*or as the case may be*].

No. 10.—Affidavit of Scripts.

In her Majesty's Court of Probate.

A. B. v. C. D.

I, { A. B.
C. D. } of in the county of party in this cause make

oath and say, that no paper or parchment writing, being or purporting to be or having the form or effect of a will or codicil or other testamentary disposition of E. F., late of in the county of , deceased, the deceased in this cause, has at any time, either before or since his death, come to the hands, possession, or knowledge of me, this deponent, save and except the true and original last will and testament of the said deceased now remaining in the principal registry of this Court [*or hereunto annexed, or as the case may be*], the said will bearing date the day of 18 [*or as the case may be*], also save and except [*here add the dates and particulars of any other testamentary papers of which the deponent has any knowledge*].

(Signed) A. B.

Sworn at on the day of 18 .
Before me,

[*person authorized to administer oaths under the act.*]

N.B.—All papers answering the description given in Rule 28, which are in the possession or under the control of the party making the affidavit, should be particularly described therein, and, if possible, annexed thereto, and brought into the principal registry. If any such papers are known to be in the possession, or under the control of any other person, the descriptions of such papers and the name and address of such other person should also be set forth.

No. 11.—The Issue.

In her Majesty's Court of Probate.

The day of 18 .

A. B. v. C. D.

A. B., by P. Q., his proctor, solicitor, or attorney, [*or in person,*] did deliver, to wit, on the day of 18 to the said C. D., his declaration in the words and figures following:

[*Here insert declaration at length.*]

Whereupon the said C. D. did deliver, to wit, on the day of to the said A. B., his plea, in the words and figures following:

[*Here insert plea at length.*]

[*Add any further pleadings.*]

Therefore the plaintiff claimed that the cause should be tried as the Court shall direct.

No. 12.—Notice as to Mode of Trial.

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In her Majesty's Court of Probate.

A. B. v. C. D.

To . . . of

Take notice, that after the expiration of eight clear days from the service hereof, to wit, on the . . . day of . . . 18 . . . , or on the next Court day on which the application can be made, the { plaintiff } in this cause intends to apply to the Court to hear this cause without a jury, [or to try the questions at issue before itself by a common or special jury], [or to direct the questions at issue to be tried before the judge of assize by a special or common jury at the next assizes to be holden in and for the county of . . .], [or as the case may be].

Dated this . . . day of . . . 18 . . .

(Signed) { A. B. }
{ C. D. }

or E. F., proctor, solicitor, or attorney

for { A. B. }
{ C. D. }

No. 13.—Record.

In her Majesty's Court of Probate.

The . . . day of . . . 18 . . .

A. B. v. C. D.

A. B., by E. F., his proctor, solicitor, or attorney, [or in person,] having cited C. D. to appear in support of any interest he may have in the estate and effects of G. H. [or according to the terms of the citation], [or A. B., by E. F., his proctor, solicitor, or attorney, (or in person,) having warned the caveat entered by C. D. in the estate and effects of G. H.,] late of . . . , deceased, who died on or about the . . . day of . . . 18 . . . , at . . . , the said C. D. appeared thereto personally [or by his proctor, solicitor, or attorney]: Whereupon . . . to wit, on the . . . day of . . . 18 . . . , did deliver his declaration to the said . . . in the words and figures following:

[Here insert declaration at length.]

Whereupon the said . . . did deliver, to wit, on the . . . day of . . . to the said . . . , his plea in the words and figures following:

[Here insert at length plea and any further pleadings.]

Therefore . . . claimed that the cause should be tried as the Court should direct.

Whereupon the judge did order as follows:

[Here set forth the direction as to the mode of hearing or trial.]

No. 14.—Record in case of Party cited not appearing.

In her Majesty's Court of Probate.

The . . . day of . . . 18 . . .

A. B. v. C. D.

A. B., by E. F., his proctor, solicitor, or attorney, [or in person,] having cited C. D. to appear in support of any interest he may have in the estate and effects of G. H. [or according to the terms of the citation],

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late of deceased, who died on or about the day of 18 ,
at , the said C. D. did not in anywise appear thereto : whereupon,
in default of appearance of the said C. D., the said A. B. did file his
declaration in the principal registry in the words and figures following :

[*Here insert declaration at length.*]

Therefore A. B. claimed that the cause should be tried as the Court
should direct :

Whereupon the judge did order as follows :

[*Here set forth the direction as to the mode of trial.*]

No. 15.—Form of Questions for the Jury.

In her Majesty's Court of Probate.

A. B. v. C. D.

Whereas A. B., the { plaintiff
defendant } avers, and C. D., the { defendant
plaintiff }

denies that [*here set out each question at issue between the parties, and repeat
the form as often as may be necessary ; and conclude.*]

Therefore let a jury come.

No. 16.—Subpœna ad testificandum.

VICTORIA, by the grace of God of the United Kingdom of Great
Britain and Ireland Queen, Defender of the Faith, To [*names of all
witnesses included in the subpœna*], greeting. We command you and
every of you, that, all other things set aside, and ceasing every ex-
cuse, you and every of you be and appear in your proper persons
before [*insert the name of the judge*], judge of our Court of Probate
at our Court of Probate at on the day of
by of the clock in the forenoon of the same
day, and so from day to day until the cause or proceeding is heard or
tried, to testify the truth according to your knowledge in a certain cause
now in our Court before our said judge depending between plaintiff
and defendant [*or in a certain cause or proceeding now in our
Court before our said judge depending, in default of appearance of
parties cited, entitled*], on the part of the [*plaintiff, defendant, or
as the case may be*], and at the aforesaid day, between the parties afore-
said, to be heard or tried [*or in default aforesaid, between the parties
aforesaid, to be heard*]; and this you nor any of you shall in nowise
omit, under the penalty of every of you of 100*l.* Witness [*insert the
name of the judge*], at the Court of Probate, the day of in
the year of our reign.

(Signed) E. F., Registrar.

[*Name of the practitioner and address.*]

No. 17.—Subpœna duces tecum.

VICTORIA, by the grace of God of the United Kingdom of Great
Britain and Ireland Queen, Defender of the Faith, To [*names of all
parties included in the subpœna*], greeting. We command you and every of
you, that, all other things set aside, and ceasing every excuse, you and
every of you be and appear in your proper persons before [*insert the
name of the judge*], judge of our Court of Probate at our Court of Probate
at on the day of by of the clock in the
forenoon of the same day, and so from day to day until the cause or

proceeding is heard or tried, and also that you bring with you, and produce at the time and place aforesaid [*here describe shortly the deeds, letters, papers, &c. required to be produced*], then and there to testify and show all and singular those things which you or either of you know or the said deed or instrument doth import of and concerning a certain cause or proceeding now in our said Court before our said judge depending, between plaintiff and defendant, [*or a certain cause or proceeding now in our said Court before our said judge depending, in default of appearance of parties cited, entitled*], on the part of the [*plaintiff or defendant, or as the case may be*], and at the aforesaid day between the parties aforesaid to be heard or tried. And this you nor any of you shall in nowise omit, under the penalty of every of you of 100*l*. Witness [*insert the name of the judge*], at the Court of Probate, the day of 18 , in the year of our reign.

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(Signed) E. F. Registrar.

[*Name of the practitioner and address.*]

No. 18.—Præcipe for Subpœna ad testificandum.

In Her Majesty's Court of Probate.

A. B. v. C. D.

Subpœna for to testify between A. B. plaintiff, and C. D. defendant, on the part of the plaintiff [*or defendant*], the day of 18 .

(Signed) { A. B. } or { P. A., plaintiff's [*or defendant's*] proctor,
 { C. D. } solicitor, or attorney.

No. 19.—Præcipe for Subpœna duces tecum.

In Her Majesty's Court of Probate.

A. B. v. C. D.

Subpœna for to testify and produce, &c. between A. B. plaintiff, and C. D. defendant, on the part of the plaintiff [*or defendant*], the day of 18 .

(Signed) { A. B. } or { P. A., plaintiff's [*or defendant's*] proctor,
 { C. D. } solicitor, or attorney.

No. 20.—Notice to admit Documents.

In Her Majesty's Court of Probate.

A. B. v. C. D.

Take notice that the { plaintiff } in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the { defendant } at on between the hours of and the { defendant } is hereby required, within 48 hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively to have been, that such as are specified to be copies are true copies, and such documents as are stated to

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have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in the cause. Dated, &c.

To { A. B. } or to E. F., proctor or solicitor or attorney for { defendant
C. D. } plaintiff.

(Signed) { C. D. } or G. H., proctor or solicitor or attorney { plaintiff
A. B. } defendant.

[Here describe the documents. The same form may be employed in describing the documents as is now in use in the Common Law Courts.]

No. 21.—Subpœna to bring in a Script decreed by the Court.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of .

WHEREAS there is now proceeding in our Court of Probate a certain business of proving in solemn form of law the last will and testament of A. B. , late of deceased, who died on or about at , the said will bearing date the day of 18 , promoted by C. D., the sole executor [or as the case may be] therein named, against E. F. the natural and lawful brother and one of the next of kin of the said deceased [or as the case may be]: And whereas the right honourable the judge of our said Court did, by his order made in the said cause, and bearing date , order and direct that a subpœna do issue, under seal of our said Court, to the purport and effect hereinafter mentioned: NOW THIS IS TO COMMAND YOU, that, within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the principal registry of our said Court, a certain original paper writing or script purporting to be testamentary, to wit, [here describe the script accurately], if the same be now in your possession or under your control: or in case the said paper writing or script be not in your possession, or under your control, that you, within eight days after the service hereof on you, inclusive of the day of such service, do file in the principal registry of our said Court an affidavit to that effect, and therein set forth what knowledge you have of and respecting the said paper writing or script; and this you shall in nowise omit, under the penalty of 100*l*. Witness [insert the name of the judge], at the Court of Probate, the day of 18 , in the year of our reign.

(Signed) E. F., Registrar.

[Name of the practitioner and address.]

Indorsement to be made after service.

This subpœna was served by I. K. on the within named of
at on the day of 18 .

(Signed) I. K.

No. 22.—Subpœna to a witness to be examined touching a Testamentary Paper of which he is supposed to have knowledge.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To of , greeting. We command you, that all other things set aside, and ceasing every excuse, you do appear before A. B., the judge of our Court of Probate, at our Court of Probate, at on the

day of 18 , by of the clock in the forenoon of the same day, and so from day to day until you be dismissed by our said judge, to testify the truth according to your knowledge [or to answer to certain interrogatories to be administered to you], touching a certain paper writing or script, being or purporting to be testamentary, to wit [*here describe the script, and give its date as accurately as possible*], of which said paper writing or script reasonable grounds have been furnished to our said judge for believing that you have knowledge. And this you shall in nowise omit, under the penalty of 100*l*. Witness [*insert the name of the judge*], at the Court of Probate, the day of 18 , in the year of our reign.

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E. F., Registrar.

[*Name of the practitioner and address.*]

Indorsement to be made after service.

This subpoena was served by I. K. on the within named on the day of 18 .

(Signed) I. K.

No. 23.—Præcipe for Subpœna to a Witness to bring in a Script.

In her Majesty's Court of Probate.

A. B. v. C. D.

Subpœna for W. W. to bring into and leave in the principal registry, [*here accurately describe the script*].

The day of 18 .

(Signed) { A. B. } or { P. A., plaintiff's [*or defendant's*] proctor,
 { C. D. } solicitor, or attorney.

No. 24.—Præcipe for Subpœna to a Witness to be examined touching a Testamentary Paper of which he is supposed to have knowledge.

In her Majesty's Court of Probate.

Subpœna for W. W. to testify respecting a paper writing or script being or purporting to be testamentary, to wit [*describing it*], of which he is supposed to have knowledge, on the part of , this day of 18 .

(Signed) { A. B. } or { P. A., Plaintiff's [*or defendant's*] proctor,
 { C. D. } solicitor, or attorney.

No. 25.—Entry on the Record of a Verdict.

Afterwards, on the day of 18 , before the judge of her majesty's Court of Probate, come the parties within mentioned, by their respective attorneys [*or as the case may be*] within mentioned, and a jury duly summoned also come, who, being sworn to try the matters in question between the parties, upon their oath say, that [*state the affirmative or negative of the issue, as found for the plaintiff or defendant, and in the terms adopted in the Questions for the Jury*].

[*If there be several issues joined and tried, then say*] as to the first issue within joined upon their oath say, that [*here state the affirmative or nega-*

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tive of the issue, as found for plaintiff or defendant], and as to the second issue within joined, the jury aforesaid upon their oath say, &c. [*so proceed to state the finding of the jury on all the issues*]; whereupon the judge decreed [*here set forth the tenor of the decree*].

(Signed) A. B., Registrar.

No. 26.—Entry on the Record of a Judgment.

Afterwards, on the day of 18 , before the judge of her majesty's Court of Probate, come the parties within mentioned, by their respective attornies [*or as the case may be*] within mentioned; whereupon the judge decreed [*here insert the tenor of the decree*].

(Signed) A. B., Registrar.

No. 27.—Inventory.

A true, full, and particular inventory of all and singular the personal estate and effects of A. B., late of , deceased, which have at any time since his death come to the hands, possession, or knowledge of C. D., the sole executor named in the last will and testament of the said A. B. [*or administrator of the said personal estate and effects, as the case may be*], made and exhibited upon and by virtue of the corporal oath [*or solemn affirmation*] of the said C. D., follows, to wit:

First, this exhibitant saith, that the said deceased	£	s.	d.
was at the time of his death possessed of -			
[<i>The details of the deceased's effects must be here inserted in as many sheets of paper as may be necessary, and the value inserted opposite to each particular.</i>]			

Lastly, this exhibitant saith, that no personal estate or effects of or belonging to the said deceased have at any time since his death come to the hands, possession, or knowledge of this exhibitant, save as is hereinbefore set forth.

(Signed) C. D.

On the day of 18 the said C. D. was duly sworn to [*or solemnly, sincerely, and truly declared and affirmed, according to the form of words prescribed by the statute applicable to the particular case,*] the truth of the above inventory, at
Before me,

[*person authorized to administer oaths under the Act*].

No. 28.—Petition.

In her Majesty's Court of Probate.

A. B. v. C. D.

The day of 18 .

A. B. [*or E. F., proctor, solicitor, or attorney for A. B.,*] the plaintiff says, that

[*Here insert all the facts which are to be alleged*]:

Wherefore the said A. B. prays, that

[*Here end with the prayer of the plaintiff.*]

(Signed) A. B. or C. D.

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A, B, *v.* C, D.

[Here insert the facts to be alleged in answer.]

[Here insert the prayer of the defendant.]

(Signed) C. D. or G. II.

The reply, rejoinder, &c. (if any such be necessary), are to be in the same form.

A. B. *v.* C. D.

Notice is hereby given that the { defendant } in a suit lately depending in her Majesty's Court of Probate, entitled A. B. v. C. D. has, in due time and place appealed against a certain final order or decree made in the said cause by the right honourable the judge of the said Court on the day of 18 ; whereby, amongst other things, he did order and decree [*here set forth the matters which are the subject of the appeal*].

(Signed) C. D., [or G. H., proctor, solicitor, or attorney for
C. D., the defendant, or as the case may be.]

This day of 18 .

Know all men by these presents, that we A. B. of _____, C. D. of _____, and E. F. of _____, are jointly and severally bound unto the right honourable _____ the judge of her Majesty's Court of Probate, in the sum of _____ pounds of good and lawful money of Great Britain, to be paid to the said right honourable _____, or to the judge of the said Court for the time being, for which payment well and truly to be made we bind ourselves and every of us for the whole, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the _____ day of _____ in the year of our Lord one thousand eight hundred and _____.

Whereas G. H., late of _____, died on the _____ day of _____ 18____, at _____, having, as asserted, made and duly executed { ^{his} / _{her} } last will and testament, with _____ codicil thereto, bearing date respectively the [here insert dates of the testamentary papers]: and whereas there is now pending in judgment in her Majesty's Court of Probate a certain cause or suit instituted by I. J., as one of the executors named in the said will, against K. L., the natural and lawful _____ and only next of kin of the said deceased, touching and concerning the validity of the said will and codicil, in which said cause or suit M. N., as the heir-at-law of the said G. H., has been cited to see proceedings, and has entered an appearance, and become a party to the said cause or suit: and whereas the right honourable _____, the judge aforesaid, did, on the _____ day of _____ 18____, after hearing counsel for and on behalf of all parties to the said cause or suit, appoint the above-bounden A. B. as and to be

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receiver of the real estate of the said G. H. pending the said cause or suit :

Now the condition of this obligation is such, that if the above-bounden A. B., the receiver of the real estate of the said G. H. pending the aforesaid cause or suit, do make a true and perfect inventory of all the rents, issues, and profits of the said real estate which have or shall come to his hands, possession or knowledge, or into the hands, possession, or knowledge of any other person for him, and the same so made do exhibit, or cause to be exhibited, into the principal registry of her Majesty's Court of Probate, when lawfully required so to do, and the same rents, issues, and profits do well and truly pay and appropriate according to law, that is to say, in payment and satisfaction of all charges and expenses which are or may be or become legally charged upon and payable out of the said rents, issues, and profits, and in the letting and managing the said real estate, and in performing other the duties committed to him by the judge aforesaid, and further do make or cause to be made a true and just account of his administration of the said rents, issues and profits, which shall be allowed by the said Court, and all the rest and residue of the said rents, issues, and profits to deliver and pay under the direction of the said court, then this obligation to be void and of none effect, or else to remain in full force and virtue.

(Signed) A. B. (L.s.)
C. D. (L.s.)
E. F. (L.s.)

Signed, sealed, and delivered by the within-named in the presence of P. Q., a clerk in the principal registry, or a commissioner or surrogate authorized to administer oaths in the Court of Probate.

Form which is to be followed as nearly as the circumstances of the case will allow.

No. 31.—Commission or Requisition for Examination of Witnesses.

In Her Majesty's Court of Probate.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith to [*here set forth the name and proper description of the commissioner*], greeting. Whereas a certain cause is now depending in our Court of Probate between A. B., plaintiff, and C. D., defendant. And whereas by an order made in the said cause on the day of 18 , on the application of the said A. B., it was ordered that a commission [*or requisition*] should issue under seal of our said court for the examination of [*here insert name and address of one of the persons to be examined*] and others as witnesses to be produced on the part of the said A. B. (saving all just exceptions). Now know ye that we do by virtue of this commission [*or requisition*] to you directed, authorize [*or request*] you within thirty days after the receipt of this commission [*or requisition*] at a certain time and place to be by you appointed for that purpose, with power of adjournment to such other time and place as to you shall seem convenient to cause the said witnesses to come before you, and to administer to the said witnesses respectively an oath truly to answer such questions as shall be put to them by you touching the matters set forth in the pleadings in the said cause (a true and authentic copy whereof sealed with the seal of our said court is hereunto annexed), and such oath being administered, we do hereby authorize [*or request*] and empower you to take the examination of the said witnesses touching

the matters set forth in the said pleadings, and to reduce the said examination or cause the same to be reduced into writing. And that for the purpose aforesaid you do assume to yourself some notary public or other lawful scribe as and for your actuary in that behalf if to you it should seem meet and convenient so to do. And the said examination being so taken and reduced into writing as aforesaid and subscribed by you, we do require [*or request*] you forthwith to transmit the said examination, closely sealed up, to the registry of our said court in Doctors Commons, in the city of London, together with these presents. And we do hereby give you full power and authority to do all such acts, matters, and things as may be necessary, lawful, and expedient for the due execution of this our commission [*or requisition*].

Dated at London the day of , in the year of our Lord one thousand eight hundred and , and in the year of our reign.
(Signed) X. Y., Registrar.

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Business.



*FEES to be taken in Court and Contentious Business in the
Court of Probate.*

Citation.

Contentious Business.		£	s.	d.
	On every citation - - - - -	0	5	0
	On every citation to see proceedings - - - - -	0	5	0
	Filing citation in case of non-appearance - - - - -	0	2	6
	For settling citation, or abstract thereof for advertisement, or other advertisement:			
	If five folios of seventy-two words or under - - - - -	0	2	6
	If above five folios, for each additional folio - - - - -	0	0	3

Appearance.

On entering appearance - - - - -	0	2	6
On amending an appearance - - - - -	0	2	6
Search for appearance - - - - -	0	1	0

Affidavit as to Scripts.

Filing affidavit as to scripts - - - - -	0	2	6
Filing every script annexed to such affidavit - - - - -	0	5	0

Pleadings.

Filing declaration - - - - -	0	5	0
Filing plea - - - - -	0	5	0
Filing replication or any further pleading - - - - -	0	5	0
Filing petition - - - - -	0	5	0
Filing answer - - - - -	0	5	0
Filing reply or any further writing to the petition - - - - -	0	5	0
On amending or reforming pleadings - - - - -	0	2	6

Inventories.

Filing inventory - - - - -	0	5	0
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Evidence.

Filing interrogatories (for each set) - - - - -	0	5	0
Filing deposition of each witness - - - - -	0	2	6

Record.

On depositing the record - - - - -	1	0	0
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Setting down.

Setting a cause down for hearing or trial - - - - -	0	5	0
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Questions for Jury.

	£	s.	d.	Contentious Business.
For settling questions of fact to be tried by a jury	-	-	0 10	0
Filing parchment copy questions as settled	-	-	0 2	6
Reducing into writing any question to be submitted to a jury under the judge's direction	-	-	1 0	0

Special Jury.

Order under the signature of the judge for a special jury	-	0	5	0
Filing panel	-	0	2	6

Subpœna.

On every subpœna against a witness	-	0	2	6
On every subpœna to bring in a testamentary document	-	0	5	0

Trial.

On the hearing or trial of a cause :				
From the plaintiff	-	-	1	0
From the defendant	-	-	0	15
If the hearing or trial continues more than one day, for each day :				
From the plaintiff	-	-	0	10
From the defendant	-	-	0	10

Judge's Notes.

Producing the judge's notes	-	-	0	5
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Entering Verdict, Decree, or Order.

Entering on the record the finding of the jury or the decision of the judge, to be paid by the successful party	-	0	5	0
Entering special verdict, if five folios of seventy-two words or under to be paid by the successful party	-	0	5	0
If exceeding five folios, for every additional folio of seventy-two words	-	0	1	0
Entering decree or order in pursuance of judgment of an extinct court	-	0	10	0
Entering any final order or decree made with consent of parties by the judge or by one of the registrars	-	0	10	0
Entering the final decree in a cause, or order dismissing same, to be paid by the successful party	-	0	10	0
Entering order for the examination of witnesses	-	0	5	0
Entering any order or decree in the Court book, not otherwise specified	-	0	2	6

Bill of Exceptions.

Bill of exceptions signed by the judge	-	0	5	0
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Receiver of Real Estate.

Entering order appointing a receiver of real estate	-	1	0	0
Bond to be executed by the receiver of real estate :				
If three folios of seventy-two words or under	-	0	6	0
If above three folios of seventy-two words, per folio	-	0	2	0

Contentious
Business.

Bonds.

£ s. d.

Bonds given by any person or for any purpose, the same fees as if given by a receiver of real estate :					
Assignment of bond	-	-	-	-	0 5 0

Taking Evidence.

On every commission issuing under seal of the Court	-	-	1	0	0
For taking the evidence of one or more witnesses before the registrar, and within three miles of the general post office, for each day	-	-	3	3	0
If beyond that distance, for each day in addition to travelling expenses	-	-	5	5	0
If for part of a day only, such smaller fee as the registrar in his discretion shall think proper.					
Commissioner or examiner appointed by order to take the examination of witnesses, for each day's attendance, besides travelling expenses	-	-	3	3	0

Reference to Registrar for his Report.

On each reference :					
For the registrar's attendance	-	-	1	0	0
For every hour or part of an hour, after the first hour a further fee of	-	-	0	10	0
For the registrar's report, if 5 folios of 72 words or under	-	-	0	10	0
If exceeding 5 folios, for every additional folio	-	-	0	2	0

Motions.

Filing case for motion	-	-	-	-	0 5 0
For entering the order of Court on motion	-	-	-	-	0 5 0

Certificate.

For every certificate under the hand of one or more of the registrars of the principal registry for which no other fee is payable	0	2	6		
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Summons.

Summons to attend in chambers	-	-	-	-	0 2 6
For entering the order of Court on summons	-	-	-	-	0 2 6
If a final order in the cause	-	-	-	-	0 10 0

Notices.

Filing every notice	-	-	-	-	0 1 0
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Writs.

Writ of attachment	-	-	-	-	0 7 6
Writ of sequestration	-	-	-	-	1 0 0
Writ of fi. fa.	-	-	-	-	1 0 0

Filing Fees.

Filing certificate of county court judge	-	-	-	-	0 1 0
Filing exhibits, each exhibit	-	-	-	-	0 1 0
Filing every affidavit or other document brought into Court, and deposited in the registry, not otherwise specified	-	-	-	-	0 2 6
Filing and entry of principal of remission of appeal	-	-	-	-	0 2 6

Attendance with Books, &c.

	£	s.	d.	Contentious Business.
For every attendance with any book or original document in any of the courts of law or equity in London or Westminster, or elsewhere within three miles of the principal registry -	1	1	0	
For second and each subsequent attendance in the same term or sittings after term -	0	10	6	
For every attendance with books or documents in any of the courts of law or equity in London or Westminster, or elsewhere within three miles of the principal registry, when more than one book or document are required, for each book or document besides the first -	0	5	0	
For the second and each subsequent attendance in the same term or sittings after term, for each book or document besides the first -	0	2	6	
For each day's attendance with any book or original document in any of the courts of law or equity, or elsewhere beyond the distance of three miles from the principal registry, exclusive of travelling expenses -	1	1	0	
For each day's attendance with books or documents in any of the courts of law or equity, or elsewhere beyond the distance of three miles from the principal registry, exclusive of travelling expenses, when more than one book or document are required, for each book or document besides the first -	0	5	0	
The travelling expenses to be advanced and paid to the messenger attending with wills, books, or original documents, shall include all other necessary expenses which are to be or may have been incurred by such messenger.				

Office Copies and Extracts.

For every office copy or extract of a minute, order, decree, or other document filed or deposited in the principal registry, if five folios of ninety words or under -	0	2	6
If exceeding five folios of ninety words, per folio -	0	0	6
For office copy of a minute, order, decree, or other document under seal of the court for which no other fee is payable:			
For the seal, in addition to the fee for the copy and collating -	0	5	0

Receipts.

For every receipt for a document or documents delivered out of the principal registry -	0	1	0
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Searches in Court Books.

Search in each Court book, if within the last five years -	0	1	0
If at an earlier period than within the last five years -	0	2	6

Taxing Costs.

Taxing every bill of costs:			
When taxed as between party and party, per folio of 72 words each -	0	0	6
When taxed as between practitioner and client, per folio of 72 words each -	0	1	0
The fee for taxing every bill of costs shall be due from each party heard on the taxation thereof.			

For postponement of appointment for taxation of costs, to be paid by the party at whose instance the appointment is postponed: £ s. d.

If the bill of costs is five folios of seventy-two words or under	-	-	-	-	-	0	1	0
If exceeding five folios of seventy-two words and under fifteen folios	-	-	-	-	-	0	2	6
If exceeding fifteen folios	-	-	-	-	-	0	5	0

Appointments of Officers.

For admission of a proctor	-	-	-	-	-	1	1	0
For each appointment of a commissioner in the Court of Probate-	-	-	-	-	-	1	0	0
For registering the appointment of a commissioner appointed to take oaths in the Court of Chancery	-	-	-	-	-	0	5	0

Oath.

For every oath administered by a registrar to each deponent	-	-	-	-	-	0	1	0
For marking every exhibit	-	-	-	-	-	0	1	0

*COSTS to be allowed Proctors, Solicitors, and Attornies
practising in the Court of Probate in Court and
Contentious Business.*

Citation.

	£	s.	d.	
Citation including præcipe - - - - -	0	7	6	Contentious
Citation to see proceedings, including præcipe - - - - -	0	7	6	Business.
Certificate of service - - - - -	0	2	6	
Service of citation, if within two miles of the place of business of the practitioner or of the person employed to effect the service - - - - -	0	5	0	
If beyond that distance in addition for every mile one way	0	1	0	
Affidavit of service, if three folios of seventy-two words or under - - - - -	0	5	0	
If necessarily more than three folios, for every folio, in- cluding copy - - - - -	0	1	4	
In cases in which the person to be served shall avoid service, or the service shall be effected beyond the jurisdiction, except in Scotland and Ireland, such a sum to be allowed for service as the registrar may consider reasonable under the circum- stances.				

Subpœna.

Subpœna ad testificandum, including præcipe - - - - -	0	5	0
Subpœna duces tecum, or to bring in a script, if five folios of seventy-two words, or under, including præcipe - - - - -	0	5	0
If necessarily exceeding five folios, for each additional folio of 72 words - - - - -	0	1	0
Service of a subpœna. Same as citation.			

Writ.

Writ of attachment, including præcipe - - - - -	0	7	6
Writ of sequestration, including præcipe - - - - -	0	7	6
Writ of fieri facias, including præcipe - - - - -	0	7	6

Instructions.

Instructions for citation, for pleadings, for interrogatories, for special affidavits, or for inventories - - - - -	0	6	8
Ditto to defend suit - - - - -	0	6	8
Ditto for brief, or case for hearing - - - - -	0	13	4
If there are several witnesses and the brief is necessarily long an additional fee will be allowed.			

Contentious Business.	Pleadings and Copies.	£	s.	d.
	Drawing and engrossing declaration, if ten folios of seventy-two words or under - - - - -	1	0	0
	If exceeding ten folios, for every additional folio - - - - -	0	1	4
	Drawing and engrossing pleas, replications, demurrers, and other pleadings, except those simply joining or taking issue, if ten folios of seventy-two words or under - - - - -	1	0	0
	If exceeding ten folios, for every additional folio - - - - -	0	1	4
	Copies of declaration or other pleadings to file, at per folio of seventy-two words - - - - -	0	0	4
	The Issue.			
	Drawing the issue, if fifteen folios, of seventy-two words or under, including copy - - - - -	0	10	0
	If exceeding fifteen folios, per folio, including copy - - - - -	0	0	8
	The Record.			
	Engrossing record to file, at per folio of seventy-two words, including parchment - - - - -	0	0	6
	Special Case.			
	For case for motion, including fair copy for the judge - - - - -	0	10	0
	If necessarily exceeding seven folios of seventy-two words in length, for every additional folio of seventy-two words, including copy - - - - -	0	1	4
	For case to advise on evidence, including copy for counsel - - - - -	1	0	0
	If the case exceeds ten folios in length, and it is shown that it could not be used as part of the brief or case for the hearing, an additional fee will be allowed.			
	Drawing Instruments.			
	Drawing any instrument to be filed in or issued by the registry for which no other fee is herein allowed, and for fair copy to be filed or issued, per folio of seventy-two words - - - - -	0	1	4
	Perusing and Abstracting.			
	For perusing and abstracting pleadings, testamentary papers, and exhibits of all kinds, per folio of seventy-two words - - - - -	0	0	4
	Briefs and Cases for Hearing.			
	For drawing same, per folio of seventy-two words - - - - -	0	1	0
	For each copy, per folio of seventy-two words - - - - -	0	0	4
	Maps and Plans.			
	For maps or plans - - - - - each from	1	1	0
		to	3	3
		0	10	0
	Copies of same if required - - - - - each from	1	0	0
		to	1	0
	Affidavits.			
	Drawing affidavit :			
	If five folios of seventy-two words or under, including copy for the Court or registry - - - - -	0	6	8
	If above five folios, per folio including copy - - - - -	0	1	4

Interrogatories.

	£	s.	d.	Contentious Business.
For drawing the same, at per folio of seventy-two words, and copy for the Court - - - - -	0	1	4	

Copies.

For every plain copy of a script, exhibit, or other instrument per folio of seventy-two words - - - - -	0	0	4	
If the same or any part thereof are required to be made <i>fac-simile</i> , for the part or parts copied <i>fac-simile</i> , in addition to the above per folio of seventy-two words - - - - -	0	0	2	
All copies on parchment, per folio of seventy-two words, including the parchment - - - - -	0	0	6	

Collating.

For collating any copy of a script, exhibit, or other instrument with the original, or with another copy thereof, per folio of seventy words, in addition to the fee for attendance - - - - -	0	0	2	
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Notices.

All necessary notices, if three folios or under, inclusive of copy and service - - - - -	0	5	0	
If necessarily exceeding three folios, for every additional folio - - - - -	0	1	0	
In all cases where service of a notice is necessary beyond two miles of the place of business of the practitioner, the same fee as upon the service of a citation.				

Summonses.

Drawing summonses - - - - -	0	3	4	
Copy of summons or order of the judge, and service - - - - -	0	5	0	

Attendances.

For attendance on and seeing counsel, when the fee is one guinea - - - - -	0	3	4	
When the fee exceeds one guinea and is under five guineas - - - - -	0	6	8	
When the fee is five guineas and upwards - - - - -	0	13	4	
Attendance on consultation - - - - -	0	13	4	
Attendance on conference - - - - -	0	6	8	
Attendance in pursuance of notice to admit - - - - -	0	6	8	
For every hour after the first - - - - -	0	6	8	
Attendance on trial or hearing when cause is in paper and not tried or heard, or on motion in court - - - - -	0	13	4	
On trial or hearing - - - - -	1	1	0	
If it lasts the whole day - - - - -	2	2	0	
Attendance on examination of witnesses under a commission or order—				
If in England or Wales, per diem - - - - -	2	2	0	
If elsewhere - - - - -	3	3	0	
For all necessary attendances in chambers before the judge or before a commissioner, or counsel, in the registry, or upon the adverse parties or practitioner, for which no other fee is herein allowed - - - - -	0	6	8	

Contentious Business.	Term Fees, Letters, and Messengers.	£	s.	d.
	Term fee, letters, and messengers, for each term in which any business is done in court or in chambers other than obtaining an order for taxation, or attending the taxation of bills of costs	-	-	0 15 0
	For every necessary letter written to any person other than the practitioner's own client	-	-	0 3 6

Bills of Costs.

Drawing bill of costs and copy for taxation, per folio of seventy-two words	-	-	-	-	0 1 0
Copy for the adverse party, per folio of seventy-two words	-	-	-	-	0 0 4
Attendance on taxation of bill of costs	-	-	-	-	0 13 4
If necessarily above an hour, for each additional hour or part of an hour	-	-	-	-	0 6 8
If in any Court or contentious business it should become necessary for proctors, solicitors, or attorneys to transact any business for which no fee is herein specified, such fee shall be allowed to them as would be allowed for similar business done in the courts of common law and equity.					

COSTS to be allowed Proctors, Solicitors, and Attornies practising in the Court of Probate in Contentious Business

FOR THE USE OF OTHER PERSONS.

Counsel's Clerks' Fees.

	£	s.	d.	Contentious Business.
Not to exceed as under:—				
Upon a fee to counsel under 5 guineas	-	0	2	6
5 guineas and under 10 guineas	-	0	5	0
10 guineas and under 20 guineas	-	0	10	0
20 guineas and under 30 guineas	-	0	15	0
30 guineas and under 50 guineas	-	1	0	0
50 guineas and upwards—at per cent. on the fee paid	-	2	10	0
On consultations:				
Senior's clerk	-	0	7	6
Junior's clerk	-	0	2	6
On general retainer	-	0	10	6
On common retainer	-	0	2	6
On conference	-	0	5	0

Witnesses' Expenses.

Allowance to witnesses, including their board and lodging, as between party and party:

Common witnesses, such as labourers, journeymen, &c. &c.:

If resident within five miles of the General Post Office, per diem - 0 5 0

If beyond that distance, per diem - 0 7 6

Master tradesmen, yeomen, farmers, &c.:

If resident within five miles of the General Post Office, per diem - 0 10 0

If resident beyond that distance, per diem - 0 15 0

Auctioneers and accountants:

If resident within five miles of the General Post Office, per diem - 1 1 0

If resident beyond that distance, per diem - 2 2 0

Professional men, including notaries, engineers, and surveyors, &c.:

If resident within five miles of the General Post Office, per diem - 1 1 0

If resident beyond that distance, per diem - 3 3 0

Clerk to attornies or others:

If resident within five miles of the General Post Office, per diem - 0 10 6

If resident beyond that distance, per diem - 1 1 0

Esquires, bankers, merchants, and gentlemen, per diem - 1 1 0

Contentious
Business.

Females according to station in life :	£	s.	d.
If resident within five miles of the General Post Office,	{ 0	5	0
per diem, from - - - - -	{ to		
	{ 0	10	0
If resident beyond that distance, per diem, from -	{ 0	7	6
	{ to		
	{ 1	0	0

Police inspector :

If resident within five miles of the General Post Office,			
per diem - - - - -		0	7 6
If resident beyond that distance, per diem - - - - -		0	10 0

Police constable :

If resident within five miles of the General Post Office,			
per diem - - - - -		0	5 0
If resident beyond that distance, per diem - - - - -		0	7 6

The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid ; but in no case will there be an allowance for such expenses of more than 1s. per mile one way.

Commissioners of the Court.

Commissioners of the Court for administering each oath to each deponent - - - - -		0	1 6
For marking each exhibit - - - - -		0	1 0

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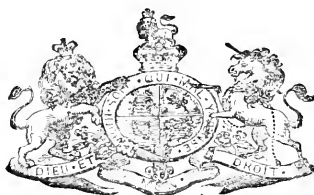
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